Decided and Reversed Nov 17 1874 20-628 Ridgway Per

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~346~~ 69

THE NORTHWESTERN UNION PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS WIFE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED DECEMBER 7, 1872.

OCT. 9, 1874

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1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a special term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held at the city of Milwaukee, in said district, on the second Monday (being the eighth day) of April, A. D. 1872. Present and presiding the honorable Thomas Drummond, circuit judge, and also present the Hon. Andrew G. Miller, district judge, Charles S. Hamilton, marshal, and Edward Kurtz, clerk. Among others the following proceedings were had, to wit:

CARLOS CLOUGH & SARAH A. CLOUGH, his wife,
vs.
THE NORTHWESTERN UNION PACKET COMpany. } At law.

Be it remembered that heretofore, to wit, at a term of said court begun and held according to law at the city of Milwaukee, on the second Monday (being the eleventh day) of April, A. D. 1870, present, the Hon. Andrew G. Miller, district judge presiding, and on the first day of said term, to wit, on the eleventh (11th) day of April, A. D. 1870, the following proceedings were had, to wit:

2 *Order docketing the case.*

CARLOS CLOUGH & SARAH A. CLOUGH, HIS wife,
vs.
THE NORTHWESTERN UNION PACKET COMpany. } At law.

This day came the defendant's counsel, Messrs. John W. & A. L. Cary, and presented to the court copies of the process, pleadings, and proceedings in this case certified from the circuit court for Milwaukee County, within this district, including the petition and bond on the part of the defendant required by law for the removal of the case to this court, and the order of said court for such removal. Whereupon it is ordered by the court that the said certified copies be filed, and that the case be entered on the law docket of this court, and proceeded in as if it had been commenced here by original process. Which certified copies are as follows, to wit:

Certified copies from State court.

State of Wisconsin, circuit court of Milwaukee Co.

CHARLES CLOUGH AND WIFE
against
THE NORTHWESTERN UNION PACKET COMpany.

COUNTY OF LA CROSSE, *ss:*

John J. Cole, of said county, being duly sworn, says that he is well

acquainted with Peyton S. Davidson, and knows him to be the superintendent and managing agent of said company, (the defendant in this action,) residing at La Crosse, Wisconsin, and the principal office
3 of said company in and for the State of Wisconsin, and further says that on the 6th day of January, A. D. 1870, deponent served upon said P. S. Davidson at his residence in La Crosse, copies of the summons and complaint in this action, by delivering to and leaving in his possession said copies, duly endorsed with a certificate that they were true copies of the originals and of the date of such service over deponent's signature.

JOHN J. COLE.

Sworn this 13th day of January, 1870, before me.

H. E. HUBBARD,
Police Justice.

Circuit court, county of Milwaukee.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife, plaintiffs,
against
THE NORTHWESTERN UNION PACKET COMPANY, defendant.

The plaintiffs complain of the defendant and allege the following facts constituting their cause of action.

I. That the plaintiff Sarah A. Clough is the wife of the plaintiff Carlos Clough.

II. That the defendant now is and was at the times hereinafter mentioned a corporation created by and under the laws of the State of Iowa, organized pursuant to the laws of that State, and doing business as common carriers of passengers, of freight for hire and compen-
4 sation, between the city of S't Paul, Minnesota, and the city of S't Louis, Missouri, the intermediate landings and points on the Mississippi River, by the name of the Northwestern Union Packet Company, and was the owner and proprietor of a certain steamboat called the Phil Sheridan, used by the deponent, and employed in carrying and conveying passengers, goods, wares, and merchandise for hire and compensation between the places aforesaid mentioned on the Mississippi River, and the divers other places in and adjacent to said river between the city of S't Paul, Minnesota, and S't Louis, Missouri. Being such owner and proprietor of the said steamboat, the said defendant on the 30th day of September, 1869, landed the said steamboat (then on its passage from S't Paul down the Mississippi River) at Reed's Landing, for the purpose of loading on freight at that point, and taking aboard such passengers as were there awaiting at Reed's Landing, and desirous of taking passage on board of defendant's said steamboat for the purpose of being conveyed down said river to S't Louis and the other places on and adjacent to said river between Reed's Landing and St. Louis. That upon said landing of said steamboat at Reed's Landing at the time, and for the purpose aforesaid, the defendant, by its officers, agents, and servants who were then and there in command of said steamboat, and had its management and control, for the purpose of inducing the passengers in wait-
5 ing to walk on said boat and take passage down said river thereon, did negligently, carelessly, and wrongfully place, run out, and extend from the side of said steamboat to and upon the bank or wharf of

said landing, four large, long, loose, heavy planks, single, and detached from each other, for the purpose of creating and erecting a platform or causeway to enable the plaintiffs and other persons there in waiting to walk on board said boat from the wharf of said landing; the said defendant, by its officers, agents and servants then in command of said steamboat, then and there represented to the passengers there in waiting to go on board, that the said plank, platform, or causeway was safe and sufficient to enable the passengers to go on board. That the said plaintiff Sarah A. Clough, with other passengers, was then and there in waiting upon the wharf at Reed's Landing to take passage on said boat to be conveyed therein by the defendant from Reed's Landing to Davenport, below Reed's Landing, on the Mississippi River, and, as such passenger, was induced and requested by the defendant to go on board said boat and be by the defendant conveyed therein to Davenport, in the State of Iowa, for a resonable compensation agreed to be paid by the said plaintiff to the defendant.

6 III. That on the said 30th day of September, 1869, at Reed's Landing, in the State of Minnesota aforesaid, the said plaintiff Sarah A. Clough was lawfully and by the permission and request of the defendant walking upon the plank or causeway so as aforesaid laid from the wharf to said boat, to take passage on said boat to be conveyed to Davenport, Iowa, and while she was so walking thereon from the wharf, with other passengers, on to said steamboat, the said defendant so carelessly, negligently, and wrongfully managed said boat, in not properly tieing and fastening said boat, that the said boat swung and moved out into the river from the wharf or shore, thereby letting the end of the outside plank of the causeway, upon which the defendant was walking, fall from said boat, and precipitating the plaintiff from said walk or plank into the river, and the said boat still continuing to move out into the river from the wharf, the other remaining plank of the said causeway *were* loosened from the end on the boat and fell upon the said plaintiff, Sarah A. Clough, a distance of six feet, with another passenger standing thereon. hitting her upon her left arm, side, & leg with great violence and force, and without any fault or

7 negligence on the part of the said plaintiff. That through the negligence, careless and unskilful management of the defendant and its officers and servants of said boat, and in the erection and construction of the platform or causeway, the said plaintiff was precipitated into the river, and the heavy plank of said walk fell upon her with such force and violence as to greatly injure her left arm and shoulder, side and leg, injuring the internal organs of her chest, and causing her to vomit large quantities of blood from the stomach, greatly bruising and wounding her left leg, causing the same to swell and the flesh thereof to become inflamed, ulcerate and break, run and be sore and painful, and causing traumatic necrosis tibia on shin-bone, by which she was compelled to suffer the loss of large portions of the bone of the leg. That she was thereby put in great bodily pain & suffering in mind, and was and now is and ever has been very sick, sore, weak, lame, and diseased, & was permanently injured and disabled in her body and limb, and was put in great fear of her life, and is now confined to her bed sick, and ever has been since the injury aforesaid by reason of the premises aforesaid.

IV. And the said plaintiff alleges that his said wife, Sarah A. Clough, has remained and continued so sick, weak, and diseased for a long

8 space of time, to wit, from the happening of the said injury, on the 30th day of September, 1869, to the commencement of this

action, and is still sick, weak, diseased, and permanently disabled in body and limb; during all which last-mentioned time the said plaintiff hath lost and been deprived of the aid and assistance of his said wife in the management of his domestic affairs & business, and hath been forced and obliged to lay out & expend, and did actually lay out and expend, divers sums of money, to wit, the sum of five hundred dollars, in and about the attempting the cure of his said wife, and the necessary medical attendance of physician, medicine, means of cure, and assistance for her during her said sickness, weakness, & disorders which ensued as aforesaid from the injuries, hurts, and bruises occasioned by the careless & negligent manner in which the defendant, by its agents, officers, and servants, managed said steamboat, and in the careless neglect and improper manner in which the defendant erected and constructed the said plank platform or causeway aforesaid; and the said plaintiff was otherwise greatly damaged and injured to the damage of twenty thousand dollars. Wherefore the plaintiffs demand judgment against the defendant for the sum of twenty thousand dollars, together with the cost of this action.

BARTLETT & PRINDLE,
Plaintiff's' Attorneys, Eau Claire, Wis.

9 Filed Jan'y 21, 1870.

JA'S HICKOX, *Clerk.*

Summons for relief.

Circuit court, county of Milwaukee.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife,
against
THE NORTHWESTERN UNION PACKET COMpany.

The State of Wisconsin to the Northwestern Union Packet Company, defendant:

You are hereby summoned to answer the complaint of Carlos Clough and Sarah A. Clough, his wife, plaintiffs, a copy of which is hereto annexed & herewith served, and to serve a copy of your answer on the subscribers at their office, in the village of Eau Claire, in the county of Eau Claire, within twenty days after the service of this summons, exclusive of the day of service, or the plaintiffs will apply to the court for the relief demanded in the complaint.

BARTLETT & PRINDLE,
Plaintiffs' Att'ys, Eau Claire, Wis.

Dated Dec. 30, 1869.

(Indorsed:) 2214. Circuit court, Milwaukee County. Summons for relief. Charles Clough and Sarah A. Clough, his wife, against The Northwestern Union Packet Company. Copy summons and complaint. Bartlett & Prindle, pl'ffs' att'y'. Filed Jan'y 21, 1870. Ja's Hickox, clerk.

10 STATE OF WISCONSIN,
County of Milwaukee, ss:

Alfred L. Cary, being duly sworn, deposes and says that, on the 10th

day of January, A. D. 1870, he served the annexed order to show cause, notice of retainer, petition, and bond upon Mess. Bartlett & Prindle, the attorneys for the plaintiffs therein named, by depositing copies thereof in the post-office at the city of Milwaukee, in the State of Wisconsin, on said 10th day of January, A. D. 1870, duly directed to said Mess. Bartlett & Prindle, at Eau Claire, Wisconsin, their place of residence, and that he paid the legal postage on said copies so as aforesaid deposited in said post-office. Deponent further says that there is a regular communication by mail between said Milwaukee and said Eau Claire.

ALFRED L. CARY.

Sworn to before me this 11th day of January, A. D. 1870.

GEO. COGSWELL,
Notary Public Mil. Co., Wis.

Circuit court, Milwaukee County.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife,
against
THE NORTHWESTERN UNION PACKET COMpany.

On reading the annexed notice of retainer, petition, and bond, it is hereby ordered that the above-named plaintiffs show cause before
11 this court, at the court-house in the city and county of Milwaukee, and State of Wisconsin, on the 24th day of January instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why the above-entitled cause action should not be removed to the circuit court of the United States for the district of Wisconsin, according to the prayer of said petition; and it is further ordered that all proceedings in this action be stayed until this order shall have been heard and determined; and it is further ordered that a copy of this order and of said notice of retainer, petition, and bond be served upon the attorneys for said plaintiffs at least four days before the return day of this order.

Dated January 10th, A. D. 1870.

By the court:

DAVID W. SMALL, *Judge.*

Circuit court, Milwaukee County.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife,
against
THE NORTHWESTERN UNION PACKET COMpany.

To Mess. Bartlett & Prindle, attorneys for plaintiffs.

GENTLEMEN: Take notice that we have been and are retained to defend this action on behalf of the said defendant, The Northwestern Union Packet Company, and appear for it therein.

Dated January 10th, 1870.

Yours, &c.,

JOHN W. & A. L. CARY,
Defendants' Att'ys, Milwaukee, Wis.

12 Circuit court, Milwaukee County.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife,
against
THE NORTHWESTERN UNION PACKET COMpany.

To the circuit court for Milwaukee County:

Your petitioner, The Northwestern Union Packet Company, respectfully shows to said court that the above-named Carlos Clough and Sarah A. Clough, his wife, have commenced a suit and action against it, the said The Northwestern Union Packet Company, in the said circuit court for the county of Milwaukee, in the State of Wisconsin, and which is the above-entitled action, and which is now pending in said court.

Your petitioner further shows and alleges that the said Carlos Clough and Sarah A. Clough, his wife, plaintiffs in said action, are residents and citizens of said State of Wisconsin, and that your petitioner, the said The Northwestern Union Packet Company, defendant in said action, is a corporation created, organized, and existing under and by virtue of the laws of the State of Iowa, and is a citizen of the said State of Iowa, and engaged in business therein.

Your petitioner further shows and alleges that the matter in dispute in the above-entitled suit, cause, action, in which the said Carlos Clough and Sarah A. Clough, his wife, are plaintiffs, and the said The
13 Northwestern Union Packet Company, your petitioner, is defendant, exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further shows and alleges that it is now ready and willing and hereby offers good and sufficient security for its entering in the circuit court of the United States for the district of Wisconsin, on the first day of its next session, copies of said process against it, and also for its there appearing and entering special bail in said cause, action, if special bail was originally required therein.

Your petitioner, the Northwestern Union Packet Company, defendant in said cause, action, therefore prays that the said above-entitled action, cause, wherein said Carlos Clough and Sarah A. Clough, his wife, are plaintiffs, and your petitioner is defendant, may be removed to the said circuit court of the United States for the district of Wisconsin, and that all proceedings in said action, cause, in the said circuit court for the county of Milwaukee, in the State of Wisconsin, may be stayed; and your petitioner will ever pray, &c.

NORTHWESTERN UNION PACKET CO.,
By P. S. DAVIDSON, *Superintendent.*

JOHN W. & A. L. CARY,
Defendant's Attorneys.

STATE OF WISCONSIN,
County of La Crosse, ss:

Peyton S. Davidson, being duly sworn, deposes and says that the petitioner named in and who makes the foregoing and annexed
14 petition is a corporation created and organized under and by virtue of the laws of the State of Iowa, and that deponent is one of its officers, to wit, its general superintendent; that deponent has read said petition and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

P. S. DAVIDSON.

Sworn to before me this eighth day of January, 1870.
[SEAL.] ANGUS CAMERON,
Notary Public for Wisconsin,
residing in La Crosse Co.

Circuit court, Milwaukee County.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife,
against
THE NORTHWESTERN UNION PACKET COMPANY.

Know all men by these presents that we, Joseph A. Shepherd and Peyton S. Davidson, of the city of La Crosse, in the State of Wisconsin, are held and firmly bound unto Carlos Clough and Sarah A. Clough, or their certain attorneys, executors, administrators, or assigns, in the sum of five hundred dollars lawful money of the United States
15 of America, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this 8th day of January, 1870.

Whereas the above-named Carlos Clough and Sarah A. Clough have commenced a suit, action, in the circuit court for Milwaukee County, in the State of Wisconsin, against the above-named The Northwestern Union Packet Company; and whereas the said The Northwestern Union Packet Company is about to file its petition to the said circuit court for Milwaukee County, praying for a removal of said action, cause, to the circuit court of the United States for the district of Wisconsin, in pursuance of the act of Congress in such case made and provided:

Now, therefore, the condition of this obligation is such that if the above-named The Northwestern Union Packet Company shall enter in the said circuit court of the United States for said district of Wisconsin, on the first day of its next session, copies of said process against it, and also if it shall then appear and put in special bail in said cause, if special bail was originally required therein, then this obligation shall be void, otherwise valid.

J. A. SHEPHERD. [SEAL.]
P. S. DAVIDSON. [SEAL.]

STATE OF WISCONSIN,
16 *County of La Crosse, ss:*

Joseph A. Shepherd and Peyton S. Davidson, being duly sworn, doth each for himself depose and say that he is worth the sum of one thousand dollars over and above all debts and exemptions, and that he is a householder and resident of this State.

J. A. SHEPHERD.
P. S. DAVIDSON.

Sworn to before me this eighth day of January, A. D. 1870.
[SEAL.] ANGUS CAMERON,
Notary Public for Wisconsin,
residing in La Crosse County.

(Indorsed:) Circuit court, Milwaukee County. Carlos Clough et al. against Northwestern Union Packet Company. Copy. Order to show cause. Notice of retainer. Petition for removal and bond. John W. & A. L. Cary, def't's att'ys. Filed Jan'y 22, 1870. Hickcox, clerk.

Circuit court, Milwaukee County.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife,
against
THE NORTHWESTERN UNION PACKET COMpany.

The petition of the above-named defendant, The Northwestern Union Packet Company, for the removal of this cause into the circuit
17 court of the United States in and for the district of Wisconsin, under the provisions of the act of Congress in such case made and provided, having this day come on to be heard pursuant to an order to show cause granted by this court on the 10th day of January instant, and it appearing to the court that the facts set forth in said petition are true, and that said defendant has in all respects complied with the provisions of said act of Congress:

Now, on motion of John W. and A. L. Cary, attorneys for defendant, it is hereby ordered that this court doth accept the surety offered by said defendant, and that all proceedings in the said cause in this court be, and they are hereby, stayed, and that this cause be, and the same is hereby, removed into the circuit court of the United States in and for the district of Wisconsin.

Dated Jan'y 25, 1870.

By the court.

DAN'L W. SMALL, *Judge.*

(Indorsed:) Circuit court, Milwaukee County. Carlos Clough and Sarah A. Clough, his wife, against Northwestern Union Packet Company. Copy. Order removing cause. Filed January 25, 1870. Hickcox, clerk.

18 Circuit court, Milwaukee county, January term, 1870.

Bartlett & Prindle.
Relief.

CARLOS CLOUGH AND SARAH A. CLOUGH, HIS WIFE,
against
THE NORTHWESTERN UNION PACKET COMPANY. } Relief.

JANUARY 21, 1870.—And now come the plaintiffs in the above-entitled action, by Bartlett & Prindle, their attorneys, and file their summons & complaint, with affidavit of service annexed thereto, as follows:

COUNTY OF LA CROSSE, *ss:*

John J. Cole, of said county, being duly sworn, says that he is well acquainted with Peyton S. Davidson, and knows him to be the superintendent and managing agent of said company, (the defendant in this action,) residing in La Crosse, Wisconsin; and further says that on the 6th day of January, A. D. 1870, deponent served upon said P. S. Da-

vidson, at his residence in La Crosse, Wis., copies of the summons and complaint in this action, by delivering to and leaving in his possession, said copies, duly endorsed with a certificate that they were true copies of the originals, and of the date of such service over deponent's signature.

JOHN J. COLE.

Sworn to this 13th day of January, 1870, before me.

H. E. HUBBARD, *Police Justice.*

JANUARY 22, 1870.—Notice of retainer, petition for removal of
19 cause. Bond. Order on plaintiffs to show cause why cause should not be removed to the United States circuit court, and affidavit of service thereof by mail filed.

JANUARY 25, 1870.—Order filed as follows: The petition of the above-named defendants, The Northwestern Union Packet Company, for the removal of this cause into the circuit court of the United States in and for the district of Wisconsin, under the provisions of the act of Congress in such case made and provided, having this day come on to be heard pursuant to an order to show cause granted by this court on the 10th day of January instant; and it appearing to the court that the facts set forth in said petition are true, and that said defendant has in all respects complied with the provisions of said act of Congress:

Now on motion of John W. & A. L. Cary, attorneys for defendant, it is hereby ordered that this court doth accept the surety offered by said defendant, and that all proceedings in the said cause in this court, be and they are hereby, stayed, and that this cause be, and the same is hereby removed into the circuit court of the United States in and for the district of Wisconsin.

DAVID W. SMALL, *Judge.*

Dated January 25, 1870.

State of Wisconsin, circuit court, Milwaukee County.

20 I, James Hickcox, clerk of the circuit court within and for the county of Milwaukee, in the State of Wisconsin, do hereby certify that I have compared the foregoing docket entries with the original docket entries of the proceedings had in the cause therein in said court, and that the same is a correct transcript therefrom, and of all the proceedings of record in said court in said cause; and that I have also compared the foregoing copies, hereto annexed, with the originals now on file in my office, and that they are correct transcripts therefrom, and of all of the original papers on file in this office in said cause.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at Milwaukee, this 25 day of January, A. D. 1870.

[SEAL.] JAMES HICKCOX, *Clerk.*

(Endorsed as follows:) Circuit court, Milwaukee County. Carlos Clough et al. vs. Northwestern Union Packet Company. Copy of original papers & proceedings of record. Filed April 11, 1870. Edw. Kurtz, clerk.

21 Proceedings in U. S. Circuit Court.

APRIL, 19, 1870. This day came the plaintiffs, by their counsel, and filed their declaration, and on their motion it is ordered by the court that the defendant plead thereto by the first Monday of May next or its default will be entered. Which declaration is as follows, to wit:

Declaration.

The United States circuit court, district of Wisconsin, of the April term, 1870.

Carlos Clough and Sarah A. Clough, his wife, who are citizens of the State of Wisconsin, the plaintiffs in the suit, by Bartlett & Prindle and George W. Lakin, their attorneys, come and complain of the "North-western Union Packet Company," a corporation created by the laws of the State of Iowa, and doing business in said State of Iowa, and a citizen of said State of Iowa, the defendant, in this suit, of a plea of trespass on the case.

FIRST COUNT.—For that whereas the said defendant, before and at the time of the committing of the grievances next hereinafter mentioned, was the owner and proprietor of a line of steamboats moved and propelled by steam, running upon and navigating the Mississippi River from and between the city of St. Paul, in the State of Minnesota, and the city of St. Louis, in the State of Missouri, and the intermediate points
22 and ports on the said river, and that one of the said several steamboats owned and belonging to the said defendant at the time of the grievances hereinafter complained of was and is called and known by the name of the Phil Sheridan, and was then and there owned by the said defendant, and was then and there used by the said defendant and employed in transporting, carrying, and conveying passengers and freight on the waters of the Mississippi River from the said city of St. Paul to the said city of St. Louis, and from thence back to said city of St. Paul, and to divers other places on said river between said cities; and being such owner and proprietor of said line of steamboats, and of said steamboat Phil Sheridan, which was one of said steamboats of said line, and used and employed by said defendant in the business aforesaid, the said defendant, on the 30th day of September, 1869, was running said steamboat Phil Sheridan upon the said waters of the Mississippi River in and about the business aforesaid of the said defendant; and that afterwards, to wit, on the day last aforesaid the said steamboat Phil Sheridan, in the course of its passage on the waters aforesaid between said cities, was landed and stopped at Read's Landing by the said defendant, its agents, servants, and employees then and there having charge and control of said steamboat,
23 and then and there acting in and about the business of the said defendant, at the landing-place called Read's Landing, for the purpose of taking on board and loading on freight at that point, and taking on board, for fare, reward, and consideration, such passengers as were there in waiting at said Read's Landing, and desirous of taking passage on board the defendant's said steamboat for the purpose of being carried down said river to St. Louis, and the other points and places on said river between said Read's Landing and St. Louis aforesaid; and the said defendant, and its agents then and there having charge and control of said steamboat Phil Sheridan, for and in behalf of said defendant, were then and there for a long space of time, to wit, for the space of one hour, engaged in and about the business of landing and receiving on board passengers, and in unloading and in receiving freight, and the plaintiffs aver that upon the said landing of said steamboat at said Read's Landing, at the time and for the purpose aforesaid, the defendant, by its officers, agents, and servants who were then and there in command of said steamboat, and who had its management and control, for the purpose of inducing the passengers then and

there in waiting, including the said Sarah Clough, to walk to and upon said steamboat, and to take passage down said river on said steamboat, not regarding their duty in this behalf, did negligently, carelessly, and wrongfully place, run out, and extend from the side of said steamboat, to and upon the beach or wharf of said landing, four large, long, loose, heavy planks, single and detached from each other, for the purpose of creating and erecting a platform or causeway to enable the plaintiffs and other persons then and there in waiting to walk on board said boat from the wharf of said landing; and that the said defendant, by its officers, agents, and servants then and there in command, by their and each of their acts, words, and deeds, then and there held out and represented to the passsengers and to the plaintiff Sarah A. Clough then and there in waiting, to go on board, that the said plank, platform, or causeway was safe and sufficient to enable the passengers and the plaintiff Sarah A. Clough then and there in waiting to go and to walk upon from said wharf and landing to and upon said steamboat; and the plaintiffs aver that the said Sarah A. Clough with other passengers was then and there in waiting upon the wharf at Read's Landing aforesaid, to take passage on said steamboat for fare, reward, and consideration, to be carried therein by the defendant from Read's Landing, aforesaid to Davenport, below Read's Landing, on the Mississippi River aforesaid, and, as such passenger, was induced and requested by the defendant to go and attempt to go on board said boat, and to be by the defendant carried thereon to Davenport, in the State of Iowa, for certain fare, reward, consideration, and compensation then and there agreed to be paid by the said plaintiff to the defendant; and the plaintiffs aver that on the said 30th day of September, 1869, at Read's Landing aforesaid, in the State of Minnesota, the said plaintiff Sarah A. Clough, pursuant to the inducements and requests aforesaid of the defendants aforesaid, and for the purpose aforesaid, lawfully walking upon the plank and causeway so as aforesaid laid from the wharf to said steamboat, to be walked upon by passengers intending and desiring to go on board said boat, to take passage on said steamboat to be carried thereon from Read's Landing aforesaid to Davenport, in Iowa aforesaid, and while she, said Sarah A. Clough, was so walking thereon from the wharf with other persons and passengers on to said steamboat, the said defendant so carelessly, negligently, and wrongfully managed said boat, in not properly tieing and fastening said boat, that the said boat swung around and moved out into the river from the wharf and shore, thereby letting the end of the outside plank of the causeway upon which the defendant was standing and walking fall from said boat, and precipitating the said Sarah A. Clough from said walk or plank into the river, and the said boat then and there still continuing to run out into the river from the wharf, and the other remaining planks of the said causeway were loosened from the end on the boat, and then and there fell upon the said Sarah A. Clough, a distance of six feet, with another person and passenger standing thereon, hitting and striking said Sarah A. Clough against and upon her left arm, side, and leg with great violence and force, and without any fault or negligence on the part of said plaintiff; and the plaintiffs aver that the said planks were then and there designed and intended by said defendant to be walked upon and travelled over by passengers and other persons in coming upon & in going off from said steamboat, and that said planks were the usual and only way and means of passengers and other persons to be used by them in coming upon and in going off from said steamboat at the time and place aforesaid.

And the plaintiffs aver that, by and through the negligence,
27 carelessness, and unskillful management of the defendant and its officers and servants of said boat, and in the erection and construction of the platform and causeway aforesaid, the said Sarah A. Clough, who was then and there the wife of the said Carlos Clough, was then and there, without any fault of the said plaintiffs, so as aforesaid thrown and precipitated into the river; and the heavy plank of said walk fell against and upon her with such force and violence as to greatly injure her left arm and shoulder, side and leg, and injuring the internal organs of her chest, and causing her to vomit large quantities of blood from her stomach, and greatly bruising and wounding her left leg, causing the same to swell and the flesh thereof to become inflamed, ulcerate, and break, run, and to be sore and painful, and causing necrosis of the shin-bone, by which she, said Sarah A. Clough, has been compelled to suffer the loss of large portions of the bone of the leg; and that she was thereby put to great bodily pain and suffering in mind, and was and now is and has been very sick, low, weak, lame, and disabled, and was and is permanently injured and disabled in her body and limb, and was put in great fear of her life, and is confined to her bed sick, and ever has been so confined since the injury aforesaid, by reason of the premises aforesaid.

28 And the plaintiffs aver that, by reason of the premises and the injuries aforesaid, the plaintiffs have been greatly injured and damnified, to wit, at the district of Wisconsin aforesaid, in the sum of fifty thousand dollars, to the damage of the plaintiffs of fifty thousand dollars, and therefore they bring this suit, &c.

SECOND COUNT.—And for that whereas also the said defendant, heretofore, afterwards, and before and at the time of committing the grievances next hereinafter mentioned, was the owner and proprietor of a certain other steamboat, moved and propelled by steam, called the Phil Sheridan, by said defendant used and employed in carrying and conveying passengers and goods, wares and merchandize, on the waters of the Mississippi River, from St. Paul, in the State of Minnesota, to St. Louis, in the State of Missouri, and to divers other places on and adjacent to said river, and being such owner and proprietor of said steamboat the said defendant afterwards, to wit, on the 30th day of September, 1869, was running said steamboat upon said river, and landed at Read's Landing for the purpose of taking on freight and receiving on board passengers, to be carried up and down said river for hire and reward; and the said defendant and its agents, officers, and ser-
29 ants then and there having charge and control of said steamboat were then and there, for a long space of time, to wit, for the space of one hour, engaged in and about the business of landing and receiving on board passengers and freight. And the plaintiffs aver that the said Sarah A. Clough was then and there in waiting and desirous of going on board of said steamboat as a passenger for the purpose of being carried thereon from said Read's Landing to Davenport, and was then and there ready & willing to pay to the defendant the usual and customary fare, consideration, and reward for her passage to Davenport aforesaid, and that it was the duty of the said defendant then and there to provide a safe way & means for the said Sarah A. Clough to go on board said steamboat, and to manage said steamboat carefully and prudently, so that the said Sarah A. Clough could then and there go on board said steamboat without injury. Yet the said defendant, and its officers and servants having custody and control of said steamboat, not regarding its and their duty in this behalf, conducted them-

selves so carelessly, negligently, and unskillfully in this behalf that by and through the carelessness, negligence, unskillfulness, and default of themselves, and for want of due care and attention to their duty
30 in that behalf, in neglecting and omitting to provide a safe way and means for the said Sarah A. Clough to go on board said steamboat, and in negligently and carelessly providing an unsafe way and means of going on board, and in inducing the said plaintiff Sarah A. Clough to make use of said unsafe way and means to go on board said steamboat, and for want of due care and attention on the part of said defendant, its officers and servants then and there having custody and control of said boat, the said Sarah A. Clough, while then and there attempting to walk upon the plank which extended from the wharf to said boat, and which said plank was placed there by said defendant and its servants to be walked upon by said Sarah A. Clough in going to and upon said steamboat, fell through therefrom into the water beneath & below the same, and one of said planks fell upon and against said Sarah A. Clough, by means whereof the said Sarah A. Clough, the wife of the said Carlos Clough, was greatly hurt, bruised, and injured, and the said Sarah A. Clough has remained and continued greatly hurt, bruised, and injured, so that her life has been and is despaired of from the time of the committing of said grievances to the present time, to wit, at the district of Wisconsin aforesaid. And the plaintiffs aver that, by reason of the premises and injuries to the said Sarah A.
31 Clough in this count mentioned, the plaintiffs have been greatly damaged, to wit, in the further sum of fifty thousand dollars.

To the plaintiffs damage of fifty thousand dollars, and therefore they bring suit, &c.

By BARTLETT & PRINDLE & GEO. W. LARKIN,
Pl'ffs' Att'ys.

MAY 2, 1870.—This day came the defendant by its attorneys, Messrs. John W. & A. L. Cary, and filed its plea as follows, to wit:

Plea.

Circuit court of the United States for the district of Wisconsin.

THE NORTHWESTERN UNION PACKET COMPANY *ads.* CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife.

And the said defendant, by John W. & A. L. Cary, its attorneys, comes and defends the wrong and injury when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiffs hath above therefore complained against it, and of this it, the said defendant, puts itself upon the country, &c.

JOHN W. & A. L. CARY,
Defendants' Att'ys.

Docket entry.

JUNE 22, 1870.—Six packages of depositions received from the post-office, and filed, endorsed as depositions of Sarah A. Clough, Madison W. Harris, Courtland C. Burgar, Adelia Bunker, Daniel W. Heylman, & William W. Day.

32 At a stated term of said court, begun and held according to law at the city of Madison on the fourth Monday (being the 27th day) of June, A. D. 1870, and on the third day thereof, to wit, on the 29th day of June, A. D. 1870, present, the Hon. Thomas Drummond, circuit judge, presiding, and the Hon. Andrew G. Miller, district judge, the following proceedings were had, to wit:

Trial commenced at Madison.

This day came the parties by their counsel, and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, to wit: James M. Callaway, John S. Bigelow, Daniel S. Hawley, James B. Farnsworth, Stephen G. McDowell, George Chipman, Allen Tinker, Henry C. Barnard, Ruel F. Baldwin, James Irish, Joseph L. De Hart, and David G. McCulloch, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded, the same was adjourned until to-morrow morning.

JUNE 30, 1870.—This day came the parties, by their counsel, and the trial of the issue herein was resumed, when the court ordered that the jury be discharged, and that the cause be continued without prejudice.

And afterwards, to wit, at a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee on the first Monday
33 (being the third day) of October, A. D. 1870, and on the eighteenth day of said term, to wit, on the 22nd day of October, A. D. 1870, present, the Hon. Thomas Drummond, circuit judge, presiding, and the Hon. Andrew G. Miller, district judge, the following proceedings were had, to wit:

First trial.

CARLOS CLOUGH & SARAH A. CLOUGH
vs.
THE NORTHWESTERN UNION PACKET COMPANY. } At law.

This day came the parties by their counsel, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, Samuel Hayt, George K. Gregory, M. C. Cook, Robert Trumble, Frederick Wardner, Hiram L. Hurlbut, James Siddell, Charles Fricke, Bidwell W. Brown, Isaac Selleck, John M. Heath, and Thomas J. Freeman, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded, the same was adjourned until Monday morning next.

OCTOBER 24, 1870.—This day came the parties, by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

OCTOBER 25, 1870.—This day came the parties, by their counsel, and the trial of the issue herein was resumed. And the jurors of the jury aforesaid, being charged by the court, retired to their room
34 under the charge of a sworn officer to deliberate on their verdict, and with leave to bring in a sealed verdict to-morrow morning.

Verdict.

OCTOBER 26, 1870.—This day came the parties, by their counsel. And the jurors of the jury aforesaid came into court with a sealed verdict, and on their oaths aforesaid respectively do say that the defendant is guilty in manner and form as the plaintiffs have herein declared against it, and assess the damages to the said plaintiffs at the sum of six thousand dollars.

And came the defendant's counsel and moved the court for a new trial for reasons filed, as follows:

Motion for new trial.

Circuit court of the United States eastern district of Wisconsin.

THE NORTHWESTERN UNION PACKET COMPANY
ads.
CARLOS CLOUGH AND SARAH A. CLOUGH, HIS wife.

And now comes the said defendant, The Northwestern Union Packet Company, by John W. & A. L. Cary, its attorneys, after the verdict and before judgment herein, and moves the court now here to set aside the verdict of the jury in this suit, and for a new trial herein, for the following reasons, to wit:

1st. That said verdict is excessive in the amount of damages given by the jury.

2d. That said verdict is contrary to the charge of the court.

35 3rd. That said verdict is contrary to the evidence in the case.

4th. That the court erred in admitting the deposition of the plaintiff Sarah A. Clough in evidence.

5th. That the court erred in refusing to charge the jury as requested by the defendant in the written requests asked by defendant.

6th. That the court erred in admitting the evidence of the plaintiffs' witness Shaw, to which the defendant objected.

7th. That the damages found by the jury are excessive.

8th. That said verdict is contrary to law and the evidence.

JOHN W. & A. L. CARY,
Defendant's Att'ys.

And afterwards, to wit, on the 30th day of said term, to wit, on the 5th day of November, A. D. 1870, the following proceedings were had, to wit:

Hearing of motion for new trial.

This day the motion of the defendant for a new trial came on to be heard, and was argued by Mr. John W. Cary for the said defendant, and by Messrs. H. L. Palmer and Geo. W. Lakin for the plaintiffs, and being submitted, the court held the same under advisement.

And afterwards, to wit, on the 31st day of said term, to wit, on the 7th day of November, A. D. 1870, present, the circuit judge and district judge aforesaid, the following proceedings were had, to wit:

36 *New trial granted.*

This day came the parties by their counsel, and on consideration of the motion of the defendant for a new trial, it is ordered by the court that a new trial be, and hereby is, allowed upon the payment of the plaintiffs' costs of this term.

Docket entries.

NOVEMBER 12, 1870.—$223.70, am't of plaintiff's costs, (Oct. term,) paid to clerk by def't.

AUGUST 11, 1871.—Depositions received from post-office and filed.

SEPTEMBER 27, 1871.—Three packages of depositions received from post-office and filed, endorsed as depositions of Thos. L. Halbert, Frank Clough, & Truman W. Martin.

OCTOBER 3, 1871.—This day came the defendant's counsel, and on his motion, and affidavit filed, it is ordered by the court that this cause be, and hereby is, continued upon payment of the plaintiffs' costs of this term.

DECEMBER 30, 1871.—Depositions received from post-office and filed.

JANUARY 2, 1872.—Depositions received from post-office and filed.

JANUARY 3, 1872.—This day came the defendant's counsel, and moved the court on affidavit filed for a continuance of this cause. And being argued by the counsel of the parties, and submitted, on consideration thereof, it is ordered by the court that this cause be, and hereby is, continued upon payment of the plaintiffs' costs of this term.

JANUARY 4, 1872.—Depositions received from post-office and filed.

FEBRUARY 15, 1872.—Depositions received from post-office and filed.

37 MARCH 29, 1872.—Depositions received from post-office and filed.

APRIL 1, 1872.—Depositions received from post-office and filed.

APRIL 2, 1872.—Depositions received from post-office and filed.

APRIL 5, 1872.—Depositions received from post-office and filed.

APRIL 10, 1872.—Depositions of Hugh E. Maloney, Henry C. Terrill, and Allen Passo received from Francis Bloodgood, U. S. com'r, and filed.

And now at this same term, to wit, April term, 1872, and on the fourth day thereof, to wit, on the 11th day of April, A. D. 1872, present, the circuit and district judges aforesaid, the following proceedings were had, to wit:

Second trial.

CARLOS CLOUGH & SARAH A. CLOUGH, HIS WIFE, *vs.* THE NORTHWESTERN UNION PACKET COMPANY. } At law.

This day came the parties by their counsel, and the issue herein came on to be tried. Whereupon a jury called to try the same, who came, to wit, John D. Inbusch, Charles W. Smith, Alverus E. Gilbert, Charles Smith, Nelson Lee, John B. Judson, Charles Andrews, Quartus M. Olcott, Robert Cochran, Caleb F. Fuller, Lindsey J. Smith, and Hercules F. Dousman, twelve free, honest, and lawful men of the district,

who were severally sworn and empannelled, and the trial not being concluded, the same was adjourned until to-morrow morning.

38 *Trial continued.*

APRIL 12, 1872.—This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

APRIL 13, 1872.—This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until Monday morning next.

APRIL 15, 1872.—This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

APRIL 16, 1872.—This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

APRIL 17, 1872.—This day came the parties by their counsel, and the trial of the issue herein was resumed. And the jurors of the jury aforesaid, being charged by the court, retired to their room under the charge of a sworn officer, to consider of their verdict, and with leave to bring in a sealed verdict to-morrow morning.

Verdict.

APRIL 18, 1872.—This day came the parties by their counsel. And the jurors of the jury aforesaid came into court with a sealed verdict, and on their said oaths respectively do say that the defendant is guilty in
39 manner and form as the plaintiffs have herein declared against it, and assess the damages to the said plaintiffs at the sum of five thousand seven hundred and sixty-two dollars. And came the defendant's counsel, and moved the court for a new trial for reasons filed as follows:

Motion for new trial.

Circuit court U. S., eastern district of Wisconsin.

CARLOS CLOUGH & SARAH A. CLOUGH
vs.
THE NORTHWESTERN UNION PACKET COMPANY.

And now comes the said defendant, by Carys & Cottrill its attorneys, and moves the court now here to set aside the verdict & for a new trial, and for reasons assigns the following:

1st. That the verdict is against the evidence.
2nd. That the verdict is contrary to law.
3rd. That the verdict is contrary to the charge of the court.
4th. That the court erred in the admission & rejection of evidence.
5th. That the court erred in its charge to the jury.
6th. That the verdict is excessive.

CARYS & COTTRILL,
Defendant's Att'ys.

And afterwards, to wit, on the 21st day of said term, to wit, on the 1st day of May, A. D. 1872, present, the circuit judge and district judge', aforesaid, the following proceedings were had, to wit:

40 *Argument on motion for new trial.*

This day came the parties by their counsel, and the motion of the defendant's counsel for a new trial came on to be heard, and was argued by Mr. Cary for said defendant, and by Mr. Palmer for the plaintiffs, when the court held the same under advisement.

And afterwards, to wit, on the 22nd day of said term, to wit, on the 2nd day of May, A. D. 1872, present, the circuit judge & district judge aforesaid, the following proceedings were had, to wit:

Motion for new trial overruled.—Judgment for pl'ff.

This day came the parties by their counsel, and on consideration of the motion of the defendant's counsel for a new trial, it is ordered by the court that the said motion be, and hereby is, overruled: Whereupon it is considered and adjudged by this court now here, that the said plaintiffs do have and recover of the said defendant, The Northwestern Union Packet Company, the sum of five thousand seven hundred and sixty-two dollars damages, so as aforesaid assessed by the jury, together with five hundred and sixty-six dollars and fifty-six cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment-roll signed May 2nd, A. D. 1872.

EDWARD KURTZ, *Clerk.*

Damages, $5,762.00; costs, 566.56—$6,328.56.

41 MAY 10, 1872.—This day came Peyton S. Davidson and John M. Levy, of the city and county of La Crosse, in the State of Wisconsin, and filed their bond in the penalty of ten thousand dollars, conditioned that the defendant shall prosecute a writ of error to effect, and answer all damages and costs if it fail to make its plea good, which bond is approved by the district judge, and is as follows:

Bond for supersedeas, &c.

Circuit court of the United States, eastern district of Wisconsin.

CARLOS CLOUGH AND SARAH A. CLOUGH
vs.
THE NORTHWESTERN UNION PACKET COMPANY.

Know all men by these presents that we, Peyton S. Davidson and John M. Levy, of the city and county of La Crosse, and State of Wisconsin, are held and firmly bound unto the above-named Carlos Clough and Sarah A. Clough in the sum of ten thousand dollars to be paid to the said Carlos Clough and Sarah A. Clough, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the fourth day of May, A. D. 1872.

42 Whereas the above-named defendant, The Northwestern Union Packet Company, is about to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Wisconsin, in favor of said plaintiffs and against said defendant:

Now, therefore, the condition of this obligation is such, that if the said The Northwestern Union Packet Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

P. S. DAVIDSON. [SEAL.]
JOHN M. LEVY. [SEAL.]

STATE OF WISCONSIN,
La Crosse County, ss:

We, P. S. Davidson and John M. Levy, being duly sworn, severally depose and say that we are, each of us, worth the sum of ten thousand dollars over and above all our indebtedness and property exempt from execution.

P. S. DAVIDSON.
JOHN M. LEVY.

Subscribed and sworn this 8th day of May, A. D. 1872, before me.
CYRUS K. LORD,
U. S. Commissioner, Western Dist. of Wisconsin.

(Endorsed as follows:) May 10, 1872. Approved.
A. G. MILLER,
District Judge.

43 *Order for supersedeas.*

Whereupon it is ordered that execution be superseded, and a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

JUNE 3, 1872.—Bill of exceptions signed and filed as follows, to wit:

Bill of exceptions.

Circuit court of the U. S. for the eastern district of Wisconsin.

CARLOS CLOUGH AND SARAH A. CLOUGH
vs.
THE NORTHWESTERN UNION PACKET COMPANY.

Afterwards, to wit, at a term of said court begun and held at the United States court-room, in the city of Milwaukee, on the second Monday of April, A. D. 1872, their hon's Thomas Drummond, circuit judge, and Andrew G. Miller, district judge, presiding, on the 11th day of April, of the term aforesaid, the said issues so as aforesaid joined, came on to be tried; William P. Bartlett, George W. Lakin, and Henry L.

Palmer, esquires, appearing for the plaintiffs; J. Ham Davidson and John W. Cary, esquires, appearing for the defendant; and a jury of twelve good and lawful men were duly chosen, empannelled, and sworn to try said cause.

44 And thereupon the plaintiffs' counsel, to maintain the aforesaid issues on their part, offered to read in evidence to said jury the deposition of the said Sarah A. Clough, one of said plaintiffs, to the reading of which the said defendant's counsel did then and there object for that the said Sarah A. Clough was incompetent as a witness to testify in this cause, for the reason that she was the wife of the said plaintiff, Carlos Clough, as set forth in the pleadings.

But the said court did then and there overrule said objection, to which ruling the said defendant's counsel did then and there except, and said deposition was read as follows:

SARAH A. CLOUGH, being duly sworn, doth depose and say as follows, to wit:

I reside in West Eau Claire, Eau Claire County, Wisconsin. My age is forty-four years. I am the Sarah A. Clough, plaintiff, and the wife of Carlos Clough, one of the plaintiffs in this suit. We were married at Royalton, Vermont, on the 24th day of December, A. D. 1845. I have lived in Eau Claire County about thirteen years.

On the next to the last day of September, 1869, I went from
45 here to Reed's Landing, Minnesota, on the steamer Chippewa. I arrived at Reed's Landing on the morning of the 30th September, between six and seven o'clock. We remained on the Chippewa until the Mississippi boat came down. The boat came down between one and two o'clock on the 30th September. The boat that came down was the Phil Sheridan. They put out a narrow plank, and as I went upon the outside one it slipped off and went into the water, and I on it. There were three or four planks put out. The one I walked on was the outside one, down stream. The plank next to this one slipped off and came down and struck me. They helped me out of the water, and on to the boat. I don't know who helped me out. I was stunned and unconcious for awhile. Then they put me to bed. I don't know who helped me up stairs, but rather think it was the captain. The plank which hit me struck me the whole length of my left side. The left shoulder was bruised; the hip and the whole of the side, and the left limb below the knee were all injured. The plank struck and bruised the front side of my leg below the knee. I cannot tell how far I
46 fell when the plank slipped. I was just stepping on the boat when the plank slipped. I was going to Davenport, Iowa, and I went on the boat for the purpose of obtaining a passage to Davenport on that boat. I did not see the planks put out; they were out before we went to go on board. When I went on board the captain of the boat was on the upper deck. There was nothing said by any of the officers of the boat about coming on board before we started on board. About one-half of the passengers had gone on board before I went. There were about twenty persons who were going down as passengers, and about ten had gone on board, as near as I can recollect. Mr. Martin, Mr. Shaw, Mrs. Bunker, and Mrs. Carpenter were among the passengers who went on board the boat before I did.

I was on the Phil Sheridan nearly three days—two days and a half. I went to Davenport. During the time I was on the boat Dr. Mulligan, of Wabashaw, came on board and bathed my limbs with arnica, and my side also, and gave me brandy. Don't recollect of his giving me any

thing else. I was stunned and do not recollect. I remained at Davenport between four and five days. I had no other medical treat-
47 ment while there. I kept my limb bathed in arnica and bandaged it at night. I then came up to De Soto, in this State. I do not recollect how long it took me to come from Davenport to De Soto; I think about two days; not over three days. I remained at De Soto, I think, six days. My brother, who is a physician, gave me some medicine and bathed my limb while at De Soto. From De Soto I came home. It was about two days from De Soto till I reached home. Don't recollect the day of the month when I arrived home. I think it was about a week after I arrived home that I had medical treatment. The first physician I had was Dr. W. W. Day. I don't know how long he treated me; I should think it was two weeks; I then had the other Doctor Day. He attended me from that time until now. Dr. French has also been to see me. My brother, from De Soto, stayed with me eight days last winter.

From the time I was hurt until I arrived home I was unable to walk out. I could get from one room to another, but with difficulty. Since I arrived home I have had no use of my limb up to the present time. I cannot bear my weight upon it I never had any sores or diffi-
48 culty with my limb prior to this injury. Prior to this injury I have never had any ulcerated sores or anything of the kind; since I was hurt my left side has troubled me, and it is growing smaller. I have suffered pain constantly since I was injured, at times severe pain, both in my limb and side. The limb has been the worst by spells. After the injury, and I was on the boat, I was sick, and was not able to sit up until the next day night. I vomited blood considerably whenever I raised up during the first night. I suffered a good deal of pain that night, but not much afterwards, except in my limb. My side has troubled me a good deal in the last two or three months, and does trouble me now more or less. Prior to this injury I had never vomited blood.

Cross-examination:

I think it was about four or five days after I arrived home before I employed a physician. During this four or five days, I was about the house some of the time, and got about the house with difficulty without the assistance of a crutch. During this four or five days I treated the limb with the liniment my brother gave me. I cannot walk around now without the crutch. I cannot use my limb now of any account; can only touch my toes to the floor. The sore on my limb is entirely healed
49 up and has been so about six weeks. When at De Soto, at my brother's, I did not walk around much of any; I didn't go out of the house to walk. While in Davenport I didn't walk any. I was around the house. I was not confined to my bed during the day, and was confined to my room most of the time while there; I had no medical treatment; I used the arnica.

Mrs. Bunker, a lady from Eau Claire, and Mrs. Carpenter, formerly of Eau Claire, waited on me on my way down to Davenport. The chambermaid of the boat also assisted. After I went on board the boat after the injury, I went directly to bed, and was not dressed until the next day night, about a day and a half after the injury. By the help of the ladies I was up and about the cabin perhaps one half of the time during the remainder of the trip. No one assisted me to go on board the boat prior to the accident. I was up town, on the street, when the boat came in a short distance off; I did not see them put out the planks;

I did not see the boat land. There were passengers going on to the boat when I came down. Perhaps the boat had landed fifteen minutes when I came down, not longer than that. There was one lady ahead of me on the plank, Mrs. Bunker, when I went on board, and I
50 think Captain Harris with her child. She would have fallen into the river if it hadn't been for him. I know there was no one else ahead of me on the plank going on board.

Dr. Mulligan examined nothing but my limb; he was not with me long, making applications of arnica; he gave orders to the ladies on board and to the chambermaid.

On my return from Davenport I came as far as De Soto on the "Phil Sheridan;" I have forgotten the name of the boat I came on from De Soto. My meals were served to me in my state-room by the chambermaid most of the time on the trip to Davenport. I think the steward served me with meals the first evening after I was injured, but not afterwards. I don't remember that Dr. Mulligan was in the room when I threw up blood, but he knew of it. He remained on board the boat about a day and a half.

Re-direct:

A Miss Viles was on the plank that hit me; she was from Elkhorn. I paid no fare down to Davenport on the boat. The chambermaid handed me a paper. (Witness here produced a paper, which is hereunto attached and marked Exhibit "A," which is the paper referred to in her testimony above, as having been handed to her by the chambermaid
51 of the Phil Sheridan on the trip to Davenport.)

Question by plaintiffs' counsel. What did the chambermaid say to you when she handed you this paper?

(Objected to by defendant's counsel.)

Answer. She said the clerk requested her to hand me that paper.

Question by plaintiffs' counsel. What conversation, if any, did you have with the captain of the steamboat Phil Sheridan, after the accident on the trip down to Davenport?

(Objected to by defendant's counsel.

Here the defendant's counsel on the trial renewed and insisted upon said last objection. But the said court did then and there overrule the same, and defendant's counsel excepted to said ruling, and the answer was read to the jury as follows:)

Answer. He said it was through the carelessness of the hands in putting out the plank, that I fell; that they didn't put out the regular gang-plank, but the loose planks. He did not say anything to me about the fare down.

Re-cross-examination:

It was the evening before we got into Davenport that I had this conversation with the captain. It was in the cabin; we stood up by the piano. I have given the exact words he used as near as I can
52 remember. The chambermaid handed me this paper (Ex. "A,") in the afternoon just before we reached Davenport.

Re-direct examination:

I suppose this paper (Exhibit "A") was a receipt for my fare down, and I was thanking the captain for my fare, when we had the conversation which I have testified to, about the accident. (Exhibit A was a bill unreceipted for the fare of Mrs. Clough from Reed's Landing to Davenport & back.)

The plaintiff's counsel, further to maintain said issues on their part, read in evidence to said jury the depositions of several witnesses and called several others to testify, by which it appears that defendant was the owner of the steamboat Phil Sheridan; that she was running between St. Paul and St. Louis on the Mississippi, carrying freight and passengers, for hire; that the plaintiff, Sarah A. Clough, attempted to go on board of said steamer at Reed's Landing as a passenger, and that in going up the planks on the said boat the planks fell; that she was afterwards assisted on board the boat, and went on said boat to Davenport as a passenger, but that she declined to pay her fare, on account of the injury she had received in going on to the boat, and that no fare was paid.

53 Said witnesses also testified to the facts and circumstances relating to said accident, and the manner in which it occurred, and tending to show that the defendan'ts officers and agents were guilty of negligence which caused the accident and injury to the plaintiff Sarah A. Clough.

The plaintiff also read in evidence the depositions of W'm W. Day and D. W. Day, and called as witnesses Seth French and E. B. Wolcott, physicians and surgeons, to show the extent of the injuries received by the plaintiff, Sarah A. Clough.

And thereupon the plaintiffs rested their cause.

The defendant's counsel, to maintain the issue on its part, offered to read in evidence the ex-parte deposition of Robert Turner, taken in the city of Memphis, in the State of Tennessee, before L. E. Dyer, a commissioner of the United States court for the western district of Tennessee under the act of Congress.

When the deposition was opened in court, there was found fastened or attached to the paper on which the caption, deposition, and certificate of return were written the following affidavit:

In United States circuit court for the eastern district of Wisconsin.

CARLOS CLOUGH AND SARAH A. CLOUGH,
54 his wife, plaintiffs,
against
THE NORTHWESTERN UNION PACKET COMpany, defendant.

UNITED STATES OF AMERICA,
District of Minnesota, State of Minnesota, County of Ramsey, ss:

J. Ham Davidson, being duly sworn, says he is attorney for the defendant in the above-entitled cause. That the testimony of Robert Turner is necessary and material for defendant in said cause on the trial of said cause in said circuit court. That said witness lives at the city of Memphis, in the State of Tennessee, as this deponent is informed and believes, which is more than one hundred miles from the place of trial of said cause, and from where the court in which said cause is to be tried is by law appointed to be held, to wit, from the city of Milwaukee, State of Wisconsin.

This deponent further says that the plaintiffs in said cause reside at Eau Claire, Wisconsin, and William Pitt Bartlett, one of the plaintiffs' attorneys, resides at Eau Claire, Wisconsin, and George W. Lakin and H. L. Palmer, the other attorneys of plaintiffs, reside at Milwaukee, Wisconsin, more than one hundred miles from the place where the deposition of said witness is to be taken, to wit, from the city of Memphis, in

the State of Tennessee, and that there is, as affiant verily believes,
55 no person, either as agent or attorney, representing the said plaintiffs, or either of them, within one hundred miles of said city of Memphis, Tennessee, where said deposition is to be taken.

Wherefore deponent asks that said deposition may be taken in conformity to the law in such case made and provided.

J. HAM DAVIDSON.

Subscribed and sworn to before me this 21st day of February, A. D. 1872.

[NOTARIAL SEAL.] WARREN H. MEAD,
Notary Public, Ramsey County, Minn.

The following were the caption and return of the commissioner:

THE UNITED STATES OF AMERICA,
Western district of Tennessee, ss:

[SEAL.] U. S. Com., D. W. Tennessee. L. E. DYER,

Be it remembered that, on the 25th of March, A. D. 1872, personally appeared at my office, at No. 450 Main street, in the city of Memphis, county of Shelby, and State of Tennessee, before me, L. E. Dyer, a United States commissioner, appointed by the circuit court of the United States in and for the western district of Tennessee, in the sixth circuit, under the laws of the United States to take affidavits and acknowledgments of bail, &c., a witness to testify, and the truth to say, on the part of and in behalf of the de-
56 fendants in a certain suit, matter of controversy now depending and undetermined in the circuit court of the United States for the eastern district of Wisconsin, (in the seventh judicial circuit,) at the city of Milwaukee, and State of Wisconsin, wherein Carlos Clough and Sarah A. Clough, his wife, are the plaintiffs and the Northwestern Union Packet Company are the defendants.

And the witness Robert Turner, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter in controversy aforesaid, did thereupon depose and say and testify as follows:

(Here follows the deposition.)

Sworn to and subscribed before me this 25th day of March, A. D. 1872.

L. E. DYER,
U. S. Commissioner, D. W. Tennessee.

THE UNITED STATES OF AMERICA,
District of West Tennessee:

I, L. E. Dyer, a commissioner, appointed by the circuit court of the United States in and for the west district of Tennessee, in the sixth circuit, under and by virtue of the acts of Congress, do hereby certify that the reason for taking the foregoing deposition, and the fact
57 is, that the witness lives at a greater distance than one hundred (100) miles from Milwaukee, Wisconsin, the place of trial and the place where the suit is pending.

I further certify that no notification of the time and place of the taking of said deposition was made out.

And I further certify that, on the 25th day of March, A. D. 1872, I was attended by R. J. Burgelhaus, esq., one of the attorneys of counsel of said libellants, and by the witness, who is of sound mind and lawful age, and the witness having been by me first cautioned and sworn

the truth to speak and to testify the whole truth, and having been by me carefully examined, the deposition was by me reduced to writing in the presence of the witness, who subscribed the same in my presence, and I have retained the said deposition in my possession for the purpose of transmitting the same by mail to the court for which the same was taken.

And I further certify that I am not of counsel or attorney for any of, or either of, the parties in said deposition and caption named, or in any way or manner interested in the event of said cause.

In testimony whereof I have subscribed my name and affixed my seal this 25th day of March, A. D. 1872.

58 [SEAL.] L. E. DYER, *U. S. Com. D. W. Tenn.*

As will be seen, the affidavit of Davidson is not referred to in the caption, nor in the return, nor was it noticed or referred to in the deposition, nor was there anything in the papers as returned to indicate that the commissioner had any knowledge of the affidavit, unless what might be inferred from its being fastened to and returned with the deposition.

To the reading of which the plaintiffs' counsel did then and there object, because the said certificate did not state the reason why notice to be present at the taking of the said deposition was not made out and served on the adverse party or his attorney.

And the said court did, then and there, sustain said objection, and the said defendant's counsel did then and there except.

The said defendant's counsel did then and there again offer said deposition in evidence, and did offer to prove by evidence aliunde, said certificate, that at the time of taking said deposition the said witness lived more than one hundred miles from the place of trial, and that the said plaintiffs and their attorneys all lived and resided and then were more than one hundred miles from the said place of taking said deposition.

To which offer the said plaintiffs' counsel did then and there
59 object, and the court sustained said objection, and the said defendant's counsel did then and there except to said ruling and decision.

The defendant's counsel, further to maintain the issue on its part, read in evidence the deposition of a number of witnesses, and also called several witnesses, all of whom testified in relation to the circumstances attending the accident, and to facts and circumstances tending to show that the defendant was not guilty of negligence that caused the injury to the plaintiff Sarah A. Clough, but that she was guilty of negligence and carelessness in attempting to go on board of said boat before it had completed her landing, and in violation of orders to keep off, which caused said injury.

The defendant's counsel then called as a witness Emma Phillips, who was sworn, and testified that she resided at Eau Claire, knew plaintiff Sarah A. Clough. In December, 1869, I went to live with her, and lived with her till March following. Mrs. Clough resided at Eau Claire.

Question. During that time did Carlos Clough, the plaintiff, live and cohabit with Sarah A. Clough as his wife?

(Objected to by plaintiffs' counsel; objection sustained by the court, and defendant's counsel excepted.

60 The witness further testified: I have known the plaintiffs since December, 1869.

Question. Have the plaintiffs lived and cohabited together as husband and wife at any time since December, 1869?

(Objected to by plaintiffs' counsel; objection sustained, and the defendant's counsel excepted.)

The defendant's counsel here stated to the court that this testimony was offered, first, to disprove the fact alleged in the declaration that plaintiffs were husband and wife, and second, in mitigation of damages in case plaintiffs were entitled to recover.

But the court then and there ruled that said testimony was inadmissible, first, because the question of the plaintiffs' relation to each other was not in issue by the pleadings, and second, that it was not admissible in mitigation of damages, and third, because the marriage of the plaintiffs had been proved without objection, and was not controverted by the defendant's counsel, and the court held that the marriage having once been established by competent evidence, the defendant's counsel could not disprove it by such testimony. Thereupon the evidence was excluded, and the defendant's counsel again excepted to each of said rulings and decisions.

61 The defendant's counsel then called Celia Babcock, who was sworn, and testified that she had resided at Eau Claire nine years, and had known plaintiffs about seven years, and that six years ago she boarded with Mrs. Clough.

Question. For four years last past have they lived and cohabited together as husband and wife?

(Objected to by plaintiffs' counsel; objection sustained by the court, and defendant's counsel then and there excepted to said ruling and decision.)

The defendant's counsel then called S. H. Wilcox, who was sworn, and testified that he resided at Eau Claire, and has resided there sixteen years and known plaintiffs for seven or eight years. I do not know whether they have lived and cohabited together as husband and wife. Have lived next door to Mrs. Clough for last seven years. Have known their relations to each other by common report and reputation during that time.

Question. Now, according to that reputation, have they for the last five years lived together as husband and wife?

(Objected to by plaintiffs' counsel; objection sustained by the court, and the defendant's counsel did then and there except to said ruling and decision.)

62 The defendant's counsel then called Alberoni Kidder, who was sworn and testified that he lived at Eau Claire, about one-fourth of a mile from Mrs. Clough's residence, and has known plaintiffs about fourteen years. I do not know where Carlos Clough spends his time only by common report.

Question. Where does he spend it according to said common report?

(Objected to by plaintiffs' counsel; objection sustained, and defendant excepted.)

Question. Is there a common reputation in Eau Claire as to whether Carlos Clough is living and cohabiting with a woman whose name was Mary Garland, down at the Slough?

The plaintiffs' counsel objected; the court sustained the objection, and defendant's counsel excepted.

The defendant's counsel then offered to show that, according to common reputation and report in Eau Claire, the plaintiff Carlos Clough was then, and for four years last past had been, living and cohabiting with said Mary Garland at a place called the Slough about twenty miles from Eau Claire.

The plaintiffs' counsel objected to said evidence, and the court sustained said objection, and then and there decided that it was not competent for the defendant to prove in this case that by common reputation the plaintiff Carlos Clough was living and cohabiting with another woman;
63 to which ruling and decision the defendant's counsel did then and there except.

The said court inter alia charged said jury that the fact that said plaintiff Sarah A. Clough had not purchased a ticket, and that she did not pay any fare, did not affect her right to recover in this case, and that she had the same right to recover as though she had purchased a ticket or paid fare as a passenger, provided when she started to go on board she went as a passenger expecting to pay her fare, and was invited and received as such by the boat; to which charge and instruction the defendant's counsel did then and there except.

The said court further charged said jury that the consent of the captain of the Sheridan not to charge any fare, as testified to by Mrs. Clough, was not a settlement or release of her right of action in this case, and would not prevent a recovery unless she so understood it and so agreed at the time; to which charge and instruction the defendant's counsel did then and there except.

And because none of the said objections, rulings, decisions, and exceptions appear in the record or proceedings of said trial, the said judges of said court have signed and sealed this bill of exceptions
64 this third day of June, A. D. 1872, as yet of said April term, A. D. 1872.

THOMAS DRUMMOND. [SEAL.]

65 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certif'cate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record & proceedings in the suit of Carlos Clough et al. vs. The Northwestern Union Packet Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said eastern district of Wisconsin, this sixteenth day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-seventh.

[SEAL.] EDWARD KURTZ, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Carlos Clough and Sarah A. Clough, plaintiffs, and the Northwestern Union Packet Company, defendant, a manifest error hath happened, to the great damage of the said Northwestern Union Packet Company, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and spedy justice done to the parties

aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, that of right and according to law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this tenth day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

EDWARD KURTZ,
Clerk U. S. Circuit Court for the East'n Dist. Wis.

(Indorsed:) Filed May 10, 1872.

EDWARD KURTZ, *Clerk.*

67 [SEAL.] The United States of America to Carlos Clough and Sarah A. Clough, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the eastern district of Wisconsin, wherein The Northwestern Union Packet Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme of the United States, this tenth day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-sixth.

A. G. MILLER,
District Judge.

I accept service of above citation this 24th day of May, A. D. 1872.
GEORGE W. LAKIN,
Att'y for Plaintiff.

(Indorsement on cover:) No. 346. The Northwestern Union Packet Company, plaintiff in error, vs. Charles Clough and Sarah A. Clough. E. Wisconsin, C. C. U. S. Filed 7th December, 1872.

O

Supreme Court United States.

No. 69. OCTOBER TERM, 1874.

THE NORTHWESTERN UNION PACKET COMPANY,

Plaintiff in Error,

AGAINST

CARLOS CLOUGH AND SARAH A. CLOUGH his wife,

Defendants in Error.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

JOHN W. CARY,

Of Counsel for Plaintiff in Error.

Supreme Court, United States.

No. 69. OCTOBER TERM, 1874.

THE NORTHWESTERN UNION PACKET COMPANY,
Plaintiff in Error.
vs.
CARLOS CLOUGH AND SARAH A. CLOUGH his wife.
Defendants in Error.

This is an action on the case, brought by defendants in error against the plaintiff in error, for negligence as a common carrier, whereby said Sarah A. Clough was injured while going on board of one of the steamboats of the plaintiff in error as a passenger.

The declaration sets forth that the plaintiff in error is a corporation of the state of Iowa and a common carrier of passengers and freight on the Mississippi steamboats from St. Paul to St. Louis, and the owner of the steamboat Phil. Sheridan; that on the 30th day of September, 1869, said steamboat Phil. Sheridan landed at Reed's Landing in Minnesota, for the purpose of taking on board such passengers as desired to take passage thereon on its downward trip; that the officers of said boat then and there, for the purpose of enabling passengers to go on to said boat, negligently, carelessly and wrongfully run out and extended from the side of said steamboat, to and upon the beach or wharf of said landing, four large, long, loose, heavy

planks, single and detached from each other, for the purpose of creating and erecting a platform or causeway for the plaintiffs and other persons then and there in waiting to walk on board said boat from the wharf of said landing, and represented it as safe to walk upon; that said Sarah thereupon attempted to walk over said plank on to said boat, and while she was so walking thereon, the defendant so carelessly, negligently and wrongfully managed said causeway, in not properly fastening the same that said boat swung around and moved out into the river from the wharf and shore thereby letting the end of the outside plank of the causeway upon which said Sarah was standing and walking fall from said wharf, precipitating her from said walk or plank into the river, and the said boat still continuing to run out into the river from the wharf, and the other remaining planks of the said causeway were loosened from the end on the boat, and then and there fell upon her, a distance of six feet, with another person or passenger standing thereon, hitting and striking her on and against and upon her left arm, side and leg with great violence and force, and without any fault or negligence on the part of said Sarah. The declaration then alleges that by and through the negligence, carelessness and unskillful management of the defendant and its officers and servants of said boat and of the erection and construction of the platform and causeway aforesaid, the said Sarah A. Clough, who was then and there the wife of the said Carlos Clough, was then and there, without any fault of the said plaintiffs so as aforesaid, thrown and precipitated into the river, and the heavy plank of said walk fell against and upon her with such force and violence as to greatly injure her left arm and shoulder, side and leg, and injuring the internal organs of her chest, and causing her to vomit large quantities of blood from her stomach, and greatly bruising and wounding her left leg, causing the same to swell, &c. (Record, p. 10.)

The defendant pleaded the general issues. (Record, p. 13.)

The cause was afterwards tried on the 24th day of October, 1870, Hon. Thomas Drummond, Circuit Judge, and Andrew

G. Miller, District Judge, presiding, and a verdict for plaintiff of $6,000 obtained; and afterwards and on the 7th of November said verdict was set aside by the court as contrary to evidence and a new trial ordered. The cause was again tried on the 17th day of April, 1872, and a verdict obtained for plaintiff for $5762, upon which judgment was entered May 2d, 1872. (Record, pp. 14 to 18.) A billof exceptions was signed, sealed and filed, (Record, pp. 19 to 27,) by which it appears that the plaintiffs, to maintain the issue on their part, offered in evidence the deposition of Sarah A. Clough, one of the plaintifls, to the reading of which the said defendant's counsel did then and there object for the reason that said Sarah was incompetent as a witness to testify in the cause, for the reason that she was the wife of the said plaintiff, Carlos Clough, as set forth in the pleadings. But the court then and there overruled said objection, to which ruling the defendant's counsel did then and there except, and said deposition was read. The said Sarah, among other things, testified that she was the wife of said Carlos, and that they were married at Royalton, Vermont, on the 29th day of December, 1845; she further testified that she went to Davenport, Iowa, was on the boat Phil. Sheridan nearly three days, two days and a half; that she paid no fare for her ride to Davenport. Question by plaintiff's counsel: "What *conversation, if any, did you have with the captain of the steamboat, Phil. Sheridan, after the accident, on the trip down to Davenport?*"

Objected to by defendant's counsel. Here the defendant's counsel, on the trial, renewed and insisted upon said last objection, but the said court did then and there overrule the same, and defendant's counsel excepted to said ruling, and the answer was read to the jury as follows:

Answer: "*He said that it was through the carelessness of the hands, in putting out theplank, that I fell; that they didn't put out the regular gang plank, but the loose plank. He did not say anything to me about the fare down.*

The plaintiff's testimony further showed that the said Sarah A. Clough went to Davenport on the Phil. Sheridan, but that

she declined to pay her fare on account of the injury she had received in going on to the boat, and that no fare was paid. (Record, p. 22 and 23.)

Emma Phillips, and several witnesses were then called to prove that plaintiffs did not live and cohabit together as husband and wife. Which was objected to by the plaintiffs' counsel, and on being requested by the court, defendant's counsel stated that said testimony was offered.

1st. To disprove the fact alleged in the declaration, that plaintiffs were husband and wife.

2d. In mitigation of damages in case plaintiffs were entitled to recover.

But the court then and there ruled that said testimony was inadmissible, first, because the question of the plaintiffs relation to each other was not in issue by the pleadings, and second, that it was not admissible in mitigation of damages, and third, because the marriage of the plaintiffs had been proved without objection, and was not controverted by the defendant's counsel, and the court held that the plaintiffs marriage having once been established by competent evidence, the defendant's counsel could not disprove it by such testimony. Thereupon the evidence was excluded, and the defendant's counsel again excepted to each of said ruling and decisions.

The defendant further offered to prove that said Carlos Clough, for over four years last past has been living and cohabiting with another woman, whose name was Mary Garland, at a different place from that where said Sarah resided, to which the plaintiff's counsel objected, the court sustained the objection, and the defendant's counsel then and there excepted to said decision.

The defendant's counsel to maintain the issue on its part, offered to read in evidence the ex-parte deposition of Robert Turner, taken in the city of Memphis, in the State of Tennessee, before L. E. Dyer, a commissioner of the United States court for the western district of Tennessee, under the act of

Congress. When the deposition was offered in court there was found fastened or attached to the paper on which the deposition, caption, and certificate of return were written the following affidavit:

In the United States Circuit Court for the Eastern District of Wisconsin.

CARLOS CLOUGH AND SARAH A. CLOUGH HIS WIFE, PLAINTIFFS,
against
THE NORTHWESTEN UNION PACKET COMPANY, DEFENDANT.

District of Minnesota, State of Minnesota, County of Ramsey, ss:

J. Ham Davidson, being duly sworn, says he is attorney for the defendant in the above entitled cause. That the testimony of Robert Turner is necessary and material for the defendant in said cause on the trial of said cause in said Circuit Court That said witness, as deponent is informed and believes, resides at the city of Memphis, in the State of Tennessee, which is more than one hundred miles from the place of trial of said cause, and from where the court in which said cause is to be tried is by law to be held, to wit, from the city of Milwaukee, State of Wisconsin. This deponent further says that the plaintiff in said cause resides at Elkhorn, Wisconsin, and her attorneys, Carpenter and Murphey, reside at Milwaukee, Wisconsin, more than one-hundred miles from the place where the deposition of said witness is to be taken, to wit, from the city of Memphis, in the State of Tennessee, and that there is, as affiant verily believes, no person, either as agent or attorney, representing the said plaintiff within one-hundred miles of said city of Memphis, Tennessee, where said deposition is to be taken.

Wherefore deponent asks that said deposition may be taken in conformity to the law in such case made and provided.

J. HAM DAVIDSON.

Subscribed and sworn to before me this 21st day of February, A. D. 1872.

[NOTARIAL SEAL.] WARREN H. MEAD,
Notary Public, Ramsey Co., Minn.

The above affidavit was not referred to in any way, nor noticed in the caption, deposition, or return, nor was there anything in the papers as returned to the court to indicate that the commissioner had any knowledge of the affidavit, unless what might be inferred from its being fastened to and returned with the deposition. The following was the caption and return of the commissioner:

THE UNITED STATES OF AMERICA,
Western District of Tennessee:

Be it remembered that on the 25th day of March, A. D. 1872, personally appeared at my office, at No. 450 Main street, in the city of Memphis, county of Shelby, and State of Tennessee, before me, L. E. Dyer, a United States commissioner, appointed by the Circuit Court of the United States in and for the west district of Tennessee, in the sixth circuit, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., a witness to testify and the truth to say, on the part of, and in behalf of, the defendant in a certain suit, action, or matter of controversy now depending and undetermined in the Circuit Court of the United States for the Eastern District of Wisconsin, (in the seventh judicial circuit,) at the city of Milwaukee, and the State of Wisconsin, wherein Euphralia F. Viles is the plaintiff, and the Northwestern Union Packet Company are the defendants.

L. E. DYER,
U. S. Com., D. W. Tenn.

And the said witness, Robert Turner, being of lawful age, and having been by me first cautioned and sworn to testify the truth in the matter of controversy aforesaid, did thereupon depose and testify and say as follows, viz:

(Here follows the deposition.)

Sworn to and subscribed before me this 25th day of March, 1872.

L. E. DYER,
U. S. Commissioner, D. W. Tennessee.

UNITED STATES OF AMERICA,
District of West Tennessee:

I, L. E. Dyer, a commissioner appointed by the Circuit Court of the United States in and for the west district of Tennessee, in the sixth circuit, under and by virtue of the acts of Congress, do hereby certify that the reason for taking the foregoing deposition, and the fact is, that the witness lives at a greater distance than one-hundred (100) miles from Milwaukee, State of Wisconsin, the place where the suit is pending.

I further certify that no notification of the time and place of taking said deposition was made out.

And I further certify that on the 25th day of March, A. D. 1872, I was attended by R. J. Burgelhaus, Esq., one of the counsel of said defendant, and by the witness, who is of sound mind and lawful age; and the witness having been by me carefully examined and cautioned, and sworn the truth to speak, and to testify the whole truth and nothing but the truth. The deposition was by me reduced to writing in the presence of the witness, who subscribed the same in my presence. And I retained the said deposition in my possession for the purpose of transmitting the same by mail to the court for which the same was taken.

And I further certify that I am not of counsel, or attorney for any or either of the parties in said deposition or caption mentioned or named, or in any way or manner interested in the event of the said cause.

In testimony whereof I have subscribed my name and affixed my seal this 25th day of March, A. D. 1872.

[SEAL.] L. E. DYER,
U. S. Com., D. W. Tenn.

To the reading of which deposition the plaintiff's counsel did then and there object, because the said certificate did not state the reason why notice to be present at the taking of the said deposition was not made out and served on the adverse

party or his attorney, and the said court sustained said objection, and the said defendant's counsel did then and there except.

The said defendant's counsel did then and there again offer said deposition in evidence, and did offer to prove by evidence aliunde said certificate; that at the time of taking said deposition the said witness lived more than one hundred miles from the place of trial, and that the said plaintiff and her attorneys all lived and resided, and then were more than one hundred miles from the said place of taking said deposition, to which offer the said plaintiff's counsel did then and there object, and the court sustained said objection, and the said defendant's counsel did then and there except to said ruling and decision.

The Judge then charged the jury, "that the consent of the captain of the Sheridan not to charge any fare, as testified to by Mrs. Clough, was not a settlement or release of her right of action in this case, and would not prevent a recovery unless she so understood it and so agreed at the time. To which charge the defendant's counsel did then and there except.

The plaintiff in error assigns error as follows:

1st. The court erred in admitting the deposition of the plaintiff Sarah A. Clough.

2d. The court erred in rejecting the evidence of Emma Phillips and others called to prove that plaintiffs did not live and cohabit together.

3d. The court erred in holding that the marriage of the plaintiff was not in issue under the pleadings,

4th. The court erred in holding that because the plaintiff Sarah A. Clough, had testified that the plaintiffs were married; that the defendant could not disprove it by such testimony as was offered.

5th. The court erred in charging the jury that the claim of the plaintiff Sarah A. Clough, that she should not pay fare in consequence of the injury received in going on to the boat, and the assent thereto of the captain did not amount to a settlement of her claim unless she so understood it.

6th. The court below erred in allowing the answer to the question put to Sarah A. Clough, above specified to be read to the jury, as follows: Answer. "He said it was through the carelessness of the hands in putting out the plank that I fell. That they didn't put out the regular gang plank, but the loose plank. He did not say anything to me about fare down."

7th. The court erred in rejecting the deposition of Robert Turner, and refusing to let it be read to the jury.

I.

The court erred in admitting the deposition of Sarah A. Clough, if she was the wife of Carlos Clough, the other deponent.

The judgment in this action, when recovered, would belong to Carlos Clough. The wife, in such cases, is joined as a formal party, but the husband would be entitled to the judgment.

Shaddock and wife vs. Clifton, 22 Wisconsin, 114, and cases cited.

The case, therefore, presents the question, can a wife be a witness for her husband? At common law she could not, has the Statutes of Wisconsin altered the common law, in this respect? no person is excluded as a witness in Wisconsin on account of interest; but the question is not whether she is interested in the event, the suit; but as to the policy of the law can a wife be a witness for her husband? If she can, she must be competent as a witness against him; and in that case a wife may be called in a suit against the husband and compelled to disclose all the domestic and marital secrets of the household. I am aware that Section 73, of page 1599, of Taylor's Statutes is claimed as authority for allowing the wife to testify in such a case as this, but it would seem that that statute is only intended to apply to cases where the suit is for the benefit of the wife, and not in this case, where the husband alone is entitled to the recovery.

II.

The court erred in holding that the marriage of plaintiffs was not in issue by the pleadings. Their right to join in this action depended wholly upon the question as to whether they were husband and wife. It was necessary for them to allege that fact, otherwise their declaration would have been demurrable. The defendant pleaded the general issue, which was a denial of every material fact in the declaration; therefore this question was in issue by the pleadings, and was necessary to be proved. If necessary to be proved it was competent for the defendant to adduce evidence to disprove it. It was therefore error to hold that it was a fact not in issue.

III.

The court erred in rejecting the evidence of Emma Phillips and others called to prove that plaintiffs did not live and cohabit together as husband and wife.

The fact that two persons live and cohabit together as husband and wife, is some proof that such relation exists between them. On the other hand, the fact that two persons do not live and cohabit together as husband and wife is some evidence that the relation does not exist.

The only evidence in this case that this relation did or ever had existed between the plaintiffs was by one of the plaintiffs. She produced no certificate or record evidence of marriage but simply her verbal statement that they had been married nearly thirty years previously. The defendants offered proof by persons that had known them for nearly one-third of that time, that they did not and had not lived or cohabited together as husband and wife since they had known them. This I submit was competent evidence tending to show that such relation did not at the time of the injury or trial exist between them.

2d. This was competent evidence to mitigate the damages. As we have already seen this prosecution was for the sole benefit of Carlos Clough, he alone was entitled to the judgment and to the money sought to be collected. The loss and damage which said Carlos Clough sustained by that injury was what the jury were to find in that case. Would not this loss be much greater to him if she was a wife with whom he was living and cohabiting, one whom he loved and cherished, than it would be if she was one with whom he had no intercourse or society.

IV.

The court erred in charging the jury that the claim of the plaintiff Sarah A. Clough, that she should not pay fare in consequence of the injury received in going on to the boat, and the assent thereto of the captain's did not amount to a settlement unless she so understood it.

Mrs. Clough paid no fare. When called upon for fare she claimed that the defendant should not collect any fare of her, because she met with an accident in coming on board the boat, and her claim was assented to. Now on what principle? Simply as a settlement of her claim for the injury against the company. She used that claim against the company to excuse herself from paying the fare which the captain of the boat had a right to collect. He yielded to her claim and received the consideration claimed. Is she not estopped further to assert it? Can she split up the claim for damages? Having asserted it once and received what she demanded, she should be held estopped in future.

V.

The conversation testified to by Mrs. Clough was hearsay, and was not competent evidence on the trial of the cause, and should have been excluded.

The accident occurred at Reed's Landing, in Minnesota, on the 30th day of September, 1869, at about two o'clock P. M.

The boat was on its downward passage to St. Louis, two days afterwards, just as the boat was nearing Davenport, in the State of Iowa, the witness Mrs. Clough had a conversation with captain Hutchinson in regard to the accident that occurred two two days previously, and the statements then made by captain Hutchinson were given in evidence on the trial as admissions of the defendant. Upon what principle can this be sustained. He was not a general agent of the company. He was not authorized to speak for the company, except in the transaction of its business. The act for which the company was sued, was the negligence of its servants at the time of its accident. The accident and everything connected with it, fixing the defendant's liability occurred two days before this conversation, consequently this admission was not a part of the transaction was not of the *res gestae*, or in any manner connected with it, and therefore was not an admission by the company, or by which the company were bound, and was not competent evidence to be received against the defendant. It was mere hearsay.

This question came before the Supreme Court of Wisconsin, in the case of Mil. and Miss. R. R. Co. vs. Finney, 10 Wisconsin, 388. In that case the court below allowed the plaintiff to give in evidence the declarations of the defendant's ticket agent, made after the transaction of selling the ticket was closed. The court held it clearly erroneous, and reversed the judgment, and Chief Justice Dixon in disposing of it, quotes the authority of Justice Story, as follows: "Where the acts of the agent will bind the principal, then his representations, declarations and admissions respecting the subject matter, will also bind him, *if made at the time* and *constitutiug* a part of the *res gestae.*"

This rule is the same, whether the principal be a corporation, or a natural person.

Angell and Ames, on corporations, Sec. 309.
1 Greenleaf Eq. 113.
10 Vesey, 123, judgment of Sir William Grant.
1 Phillips' Evidence, 507, Note 141.

In Livesby vs. Lasalette, 28 Wis., 38, the court held that where one purchased goods as agent of his wife, his subsequent declarations, that they were taken in payment of a note and chattel mortgage held by his wife, against the vendor, are not admissable in evidence against her.

Story on Agency, Sections 136 and 7.

Thallheimer vs. Brinkerhoff, 4 Wendell, 394.

This conversation occurred "just before the boat reached Davenport," and long after Miss Viles had left the boat; she left the boat at Savanna. If a cause of action ever occurred to the plaintiff it accrued through the acts and omissions of defendant's servants and employees while the boat was at Reed's Landing. There is no pretence that anything occurred afterwards to give a right of action. Hence the wrongful acts or omissions all happened at Reed's Landing, and not afterwards. How then could any one of those employees or servants of defendant make an admission two days afterwards, so connected with said wrongful acts as to become a part of the *res gestae*, and for that reason to be treated as an admission of the defendant? Wrongful acts and omissions with which defendant is charged, if done at all were done and wholly completed at Reed's, and were not afterwards repeated or continued. The rights of the parties were then fixed, and the admission testified to by Mrs. Clough, as made by Captain Hutchinson, if made, was a statement in relation to a transaction then two days passed and finished, and had none of the characteristics of an admission of an agent at the time of the transaction, so as to become a part of the *res gestae*, and for that reason treated as an admission by the principals. None of the cases sanction such an application of the rule. It was therefore error to allow this statement to go to the jury, and as it was material and necessarily operated to the injury of the defendant, the judgment should be reversed.

VI.

The Court erred in rejecting the deposition of Robert Turner.

1st. The certificate was sufficient under the statute to entitle it to be read. The only objection made to the deposition was, that the "certificate did not state the reason why notice to be present at the taking of the deposition was not made out and served on the adverse party or his attorney." The reason for taking the deposition is properly certified, also the fact that no notice was made out and therefore none could be returned. But the objection is that the reason for not giving the notice is not certified, and on this ground alone the deposition was excluded. I submit that in this ruling the court erred, for the statute does not require that such reason shall be certified, consequently there was nothing requiring such certificate. The statute under which this deposition was taken provides, "And the deposition so taken shall be retained by such magistrate until he delivers the same with his own hand into the court for which they are taken, or shall together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him, the said magistrate, sealed up and directed to such court and remain under his seal until opened in court. Oct. 1789, 1 Statutes at large, 88, 89, 90. This statute requires that the notice, if any, has been given, shall be returned, but does not require any reason to be certified as to the notice. This certificate states that no notice had been made out, and consequently none given and none could be returned. This very question was decided by the Circuit Court in Voce vs. Lawrence, 4 McLean, 203, and it was ruled against the objection made here.

2d. The affidavit of Davidson, attached to and returned with this deposition, proved the residence of the parties and their attorneys as proved that no notice was required.

3d. The court erred in refusing to allow the defendant to prove by evidence *aliunde*, the certificate that the plaintiff, and her counsel, resided more than one hundred miles from Menphis when said deposition was taken. This fact could be shown aliunde the certificate, so held in 4th McLean, 203, and Merrill

vs. Dawson, Hempstead, 592, seems to sanction the same course. In fact, as the statute does not require the certificate to state this fact, it would be no evidence if stated therein, and it must, in all cases, be proved *aliunde* the certificate. The reason for taking the deposition must be stated in the certificate because the statute requires it, and if a notice is given it must be returned with the certificate; but if no notice is given, that fact is stated in the certificate in order to show why a notice is not returned; but the reason for not giving it must be shown by proof, if required, at the trial, and cannot be proved by the certificate, because the statute does not authorize or require it. See also, Travers vs. Bell, 2 Cranch, C. C., R. 160. The deposition should therefore have been admitted and read to the jury.

I therefore submit that said judgment should be reversed.

JOHN W. CARY,

of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE NORTHWESTERN UNION PACKET COMPANY, PLAINTIFF IN ERROR.

vs.

CARLOS CLOUGH, AND SARAH A. CLOUGH, HIS WIFE.

ARGUMENT OF BARTLETT & HAYDEN, OF EAU CLAIRE, AND GEO. W. LAKIN, OF MILWAUKEE . FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

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ARGUMENT OF BARTLETT & HAYDEN, OF EAU CLAIRE, AND GEO. W. LAKIN, OF MILWAUKEE FOR DEFENDANT IN ERROR.

A definite, technical statement of the cause of action is given in the declaration, (Printed record, 19th page.) A brief concise statement of the case is as follows:

The Packet Company, the Defendant in the Court below, is a corporation created by the laws of Iowa, and is the owner of a line of steamboats navigating the Mississippi River, from St. Paul to, St. Louis. The Steamboat Phil. Sheridan, was one of the company's boats, used for carryimg freight and passengers. Said steamboat on her downward trip, stopped at Read's Landing, in the State of Minnesota, to receive on board, freight and passengers. Sarah A. Clough, the wife of C arlos Clough, was there at Read's Landing to take passage on the Phil. Sheridan to Davenport. Several loose planks were put out, extending from the boat to the wharf or landing for passengers to go on board. Sarah A. Clough, with others, attempted to walk on the planks from the landing, to, and upon, the Boat. And, while on the plank, one end of the boat, for want of being tied, or fastened, swung out from the shore, toward the centre of the stream, so that the plank on which Sarah A. Clough was walking toward the Boat, dropped down into the water, and one of said planks fell against and upon Sarah A. Clough, producing a serious and permanent injury, the particulars of which

need not here be stated. Sarah A. Clough complains and charges that the Boat's officers and employees were in fault, and that their negligence and carelessness were the causes of the accident to Sarah A. Clough, without any fault on her part.

The defendant, in the Court below, interposed the plea of not guilty. (Printed Record, 13 page,) on which issue was joined. At the first trial, the defendant was found guilty, and the damages assessd at $6000. On motion of the defendant, the verdict was set aside by the Court, and a new trial was granted. At the Subsequent Term of the Court, a second trial was had before a full bench. At that trial, the defendant was found guilty, and the jury assessed the plaintiff's damages at $5762.

The defendant moved to set aside the verdict, and for another trial. The Court denied the motion, and rendered judgment on the verdict.

The defendant tendered a Bill of Exceptions, (19th page, printed Record,) which was signed and filed; and the cause is brought to this Court by writ of error.

The rulings of the Court below, are now to be reviewed, in order to ascertain whether the Court committed any substantial error, sufficient to cause a reversal of the judgment. The errors complained of, are all embodied in the Bill of exceptions. (Printed Record, 19th page.)

The plaintiff in the Court below, offered in evidence the deposition of one of the plaintiffs, Sarah A. Clough. The defendant objected, alleging her incompetency, for the alleged reason that she was the wife of Carlos Clough, a co-plaintiff. The objection was overuled by the Court.

Did the Court err in that ruling?

That a party may be a witness in a given case, is not a new doctrine, even where there is no statute allowing it. Instances are furnished, in reported cases, where there would be a failure and denial of justice. to exclude the testimony of a party. For example, where the wearing apparel of a woman, married or single, is contained in a trunk, which is lost by the negligence of a common carrier, how is the remedy to be enforced, without the testimony of her, who alone knew what her apparel consisted of, and how much of it the trunk contained? Courts have ruled in such cases, that, from *neccssity*, the testimony of the party must be allowed. That is to ay, that she is competent to testify. The transition from a case of

that kind, is natural and easy, to the one which is under consideration, where there is an injury to the person. Read the testimony on the 20 and 21st pages of the printed Record, and then say, i there was not a *necessity* for having the testimony of the person who was injured, in order to ascertain, fully, the effect produced upon her by the falling of the plank. Who but her, could testify to her ability, or inability to use her limbs, occasioned by the accident?

For many years, the tendency of adjudications, and of legislation, has been to consider, and to allow all persons to be *competent* witnesses. Though the peculiar circumstances and relation of each witness to the case, and to the parties, are to be considered in testing the credibility of such witness. It is for the jury to say what weight the testimony shall have, and how much they will be influenced by it.

The Statute of Wisconsin provides as follows: (Chap. 136, Rev. Stat., 1858: Taylor's Statute, page 1598, Sect. 71.)

"No person shall be disqualified as a witness in any civil action or proceeding, by reason of his interest, in the event of the same as a party or otherwise, except in the cases specified in the next Section, but such interest may be shown for the purpose of affecting his credit."

Said Statutes, as amended by chapt. 54, Laws 1863, (Taylor's Statutes, page 1599, Section 73,) provide as follows:

"A party to a civil action, or proceeding may be examined as a witness in his or her own behalf, on the trial, except in actions in which the opposite party sues or defends as administrator, or legal representative of any deceased person. * * * And in case of an action for damages for personal injury to a married woman, this Section shall be so construed as to allow such married woman to be a witness on her own behalf, in the same manner as if she were not married."

The act of 2d July, 1864, Sect, 3, (13 vol. U. S. Stat. at Large,) provides that, "In Courts of the United States, there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in the issue tried."

The decisions of the Supreme Court of Wisconsin, fully sustain the position, and allow parties to testify in their own behalf, in such cases. (Barns vs. Martin, 15 Wis. 246. Shaddock vs. Town of ~~jury produced upon her body~~. It is not a case of a husband suing for loss of service, or for money expended for medical attendance.

Schleffer 22 Wis 11

Clifton, 22, Wis. 114.)

Sarah A Clough, was a *necessary*, and proper party plaintiff. (1 Chit Pl., page 73,, 18 Johnson, 443. Barnes et al vs. Martin et al, 15, Wis., 240.) The injury was to the person of Sarah A. Clough. With, in, and by her, the cause of action exists. Without her, there is no right of action. She and the meritorious cause co-exist. She is *the* party seeking to enforce her legal remedy for the actual injury. The joining of the husband, as a co-plaintiff, was a nominal thing. to answer a supposed technical requirement of the law. The death of the husband, at any time could not have defeated the right of action. If it is argued, that in case of a judgment for the plaintiff, Carlos Clough could control the judgment. The answer to that is, that the Court, on a proper application, in behalf of Sarah A. Clough, would control him, and would see that the proceeds of the judgment were properly applied, for the use of the injured person. Logically and legally, Sarah A. Clough- is *the party* plaintiff in the action, and, as effectually so, as if she stood alone, and disjoined from her husband. The 73d Section of the Statute above cited, makes her a competent witness.

Now, it is not claimed by the Packet Company, that the testimony of Sarah A. Clough, should have been ruled out and excluded on the ground that she was *the* party or *a* party plaintiff. For, under the law, as it then stood and now stands, no one contends, or has contended that a party to a suit is not a *competent* witness. The sole objection to her competency (Printed Record, 20th page,) is "that she is the wife of the plaintiff, Carlos Clough, as set forth in the pleadings."

Now, if Calos were dead, so that any judgment to be recovered would be Sarah's alone, without any interference on the part of any one, she would be a competent witness. Though the effect of her testimony would be to swear money into her own pocket, the law does not rule out her testimony. On what principle or by what reason or logic can her testimony be excluded, if it be conceded that the husband will receive one-half, or even the whole of the proceeds of the judgment. In the latter case, or event, her pecuniary interest would be nothing at all, except so far, as she may be considered as identified with her husband. As the law then stood, and still stands, interest or non-interest—bias, or no bias, for any cause, were and are matters affecting the *credibility* and not the *competency* of the witness.

Sarah A Clough, is a party plaintiff. And the Statutes of Wis-

consin, and of the United States, have so changed the common law, as to render her a competent witness. If that be so, it puts an end to all argument on the point.

The case of Barnes vs. Martin, 15 Wis., 246, was one in which Martin and his wife sued Barnes for an assault and battery, upon Martin's wife. The competency of Martin, the husband, to testify n behalf of himself and his wife was contested. The Court make use of the following language:

"The husband, Peter J. Martin, was properly received as a witness. He was a party to the action, and not within the exceptions specified in the Statute, (R. S., P. 818, Sect. 2.) The Legislature obviously intended that the rights of the parties to testify in their own behalf, should be reciprocal, which would not be the case were one to be exciuded, because his or her husband or wife, happened also to be a necessary party. The Legislature have made no such exceptions and we cannot. Neither can we see any motive of policy which should forbid their giving evidence in such cases.' The Court cites Marsh vs. Potter, 30, Barb. 506, Babbitt vs. Thomas, 31, Barb. 277; Lockhart vs. Luker, 36, Miss. 68.

In the deposition of Sarah A. Clough, (Record 22 page,) a question is asked, as follows: "What conversation if any, did you have with the Captain of the Steamboat, Phil. Sheridan, after the accident happened, on the trip down to Davenport ?".

Answer. "He said it was through the carelessness of the hands, in putting out the plank, that I fell; that they didn't put out the regular gang-plank, but the loose planks."

The defendant's,counsel claim that the declarations of,or conversation had with the Captain, are not competent evidence, and, an exception is taken to the admission of the above testimony.

Here the commanding officer of the Boat, and the agent of the Packet company, immediately, or very soon, after the accident, states a fact, to wit: the putting out the loose plank, instead of the regular gang-plauk, to be the cause of the injury. This corporation, through its agent and employee, to whom the safety of the Boat and of the passengers were entrusted and confided, acting within the scope of his authority, speaks out and informs us, what he and this corporation then considered to be the immediate cause of the accident. He spoke against his interest. He, no doubt, meant it as a censure on the subordinate employees. The fact to be proved was that several loose planks were put out, when it was

the duty of the employees to have put out the regular gang-plank. It was natural for the Captain in disclosing these facts, to attribute the fall to "*the carelessness of the hands.*"

Mr. Justice Curtis, in the case of the Enterprise, (2d Curtis's Reports, Page 321,) says, "I am quite sure, the practice has been to admit declarations made by the master while in command, concerning any matters which came under his authority as master, though not part of any *res gestæ*, strictly speaking."

(See, also, Burnside vs. Grand Trunk Railway, 47 N. H., Page 554.) In the last named case, it is held that the statement of the general freight agent of the Railway company., as to the condition of goods delivered to him for transportation, made while the goods were *in transit*, are admissible in evidence against the Co., although made 8 months after the goods were so delivered.

In the last named case, among other things, the Court say, that the only question is "whether, at the time these statements were made, the contract with the Railroad, was still in the course of execution, and we think it must be so considered."

Among the authorities cited in the opinion of the Court, are. Demerrit vs. Meserve, 39, N. H., 521. Morse, vs. Connecticut R. R. Co., 6, Gray, 450. Burgess vs. Wareham, 7, Gray, 345.

In the case at bar, it will be seen that this conversation was with the master of the boat, the agent of the defendant on board of the boat after the accident, and before Mrs. Clough had arrived at her destination. The contract that the defendant had entered into, to take and convey Mrs. Clough from Read's Landing, Minnesota, to Davenport, Iowa, had not been fullfilled, and was in process of execution.

(See Mrs. Clough's testimony. Printed case, Page 22, which is as follows:)

"It was the evening before we got into Davenport, that I had this converiation with the Captain. It was in the Cabin."

The defendant, on the trial, in the Court below, offered to read a deposition of one Robert Turner, taken *ex parte*. No notice was given to the opposite party. Nor did the commissioner certify or anywhere state the reason, or any reason why notice to be present at the taking of said deposition was not made out and served on the adverse party, or his attorney. Nor did the commissioner certify to the existence of any facts which might have excused him for the non-giving of notice.

The reading of said depositon in evidence, was objected to by the plaintiff below, and was excluded. The Packet Company insist on a reversal of the final jndgment of the Court, by reason of the alleged erroneous ruling of the Court, in excluding said deposition. (Printed Record, 25th page.) The Record nowhere shows what the testimony was, which was excluded; nor what it proved, or would have proved, if allowed to be read; nor even what it tended to prove or establish. Nothing of the substance, tendency, or effect of said deposition, is furnished by the Bill of Exceptions, or by any part of the Record, a mere inspection of which must determine the fact. What was it that the Court below ruled out? and how did the ruling prejudice, or damage the Packet Company? To reverse the judgment, it is not enough to see that the logic or the law of the Court was defective, or that the Court erred in its conclusions and decision. Counsel should show *by the Record*, that the deposition of Turner, contained testimony competent in itself, and which, if *it had not been ruled out*, by the Court, would have or *might have* prevented a verdict against the Packet Company. (Sewell vs. Eaton, 6th, Wis. 494.) The Plaintiff in Error can take nothing by this exception, for the reasons above stated.

Depositions taken *exparte*, as Turner's deposition was, without any notice to the adverse party, have never been regarded with favor, especially in contested cases, and when taken and objected to, a most rigid compliance with the forms and requirements of the law have been enforced by the Courts.

Did the Commissioner in taking and certifying to this deposition comply with the requirements of the Statute?

The deposition of Turner, was attempted to be takcn under the 30th Section of the judiciary act. (1. vol. U. S. at Large, 88 page.)

This Section expressly requires "that a notification from the magistrate before whom the deposition is to be taken to the adverse party to be present at the taking of the same, and put interrogatives, if it think fit, be first made out and *served* on the adverse party, or his attorney, as either may be nearest, if either ls within 100 miles of the place of such caption." * * * * "and the deposition so taken shall be retained by such magistrate until he deliver the same with his own hand into the Court for which they are taken. or shall. together with a certificate of the reasons as aforesaid of their being taken. and of the notice, if any given to the adverse party, be by him the said magistrate sealed up and directed to such Court. and remain under his seal until opened in Court."

The Commissioner certifies (Record 24th page,) *"that no notification of the time and place of the taking of said deposition was made out."*

Why was not the adverse party, or some one of their several attorneys notified, as the law required? why did not the magistrate comply with the express provision of the Statute, requiring notification to be given to the adverse party? He has not informed us. He has furnished us with no cause, or reason, for the omission.

The commissioner does not even state the existence of the facts which render it unnecessary for him to give notice to the adverse party or his attorney. Had he stated such facts, the reasons for the non-giving of the notice, might have been omitted. (Dinsmore vs. Maroney, 4th Blachford, 416.)

(See also 1. Cranch Circuit Court Reports, 507.)

The defendant on the trial called witnesses, whose names are furnished, (Record, 25 and 26, pages.) and questions were propounded to each of them, seeking to elict the non-cohabiting, and non-living together, of Carlos and Sarah A. Clough, as husband and wife.

These questions, and the testimony sought to be elicted by them, being ruled out by the Court, are made grounds of exceptions.

The Counsel (Record 26th page,) states that the testimony was offered, first, "to disprove the fact alleged in the declaration, that the plaintiffs were husband and wife; and second, in mitigation of damages in case "plaintiffs were entitled to recover." The response of the Court, to that statement, is eminently sound, to wit: that "the question of the plaintiff's relation to each other, was not in issue by the pleadings:" that "it was not" admissible in mitigation of damages: that the marriage of the plaintiffs had been proved without objection, and was not controverted by the defendant's counsel."

This was a common law *"action on the case,"* for consequential damages—*tortious*, in form, *ex delicto*. The cause of action is set forth in, and by a common law declaration. The plea of not guilty is interposed by the defendant. That plea puts in issue the *gravamen*, of the complaint, the fault, or guilty negligence and carelessness of the defendant, and not the relationship of the plaintiffs, or the corporate existence of the defendant, or citizenship of the parties. All of these matters however essential, are impliedly ad-

mitted by the plea *of not guilty*: The existence of the defendant as a corporation might have been put in issue, but it was not; so might the cltizenship of the respective parties, but was not; so might the relationship of the plaintiffs, but was not. Had issues on these several subjects been formed, they would have been issues in abatement of the action, and not to the *merits*. The defendants very properly elected to plead to the merits, *not gnilty*, thereby, waiving all formal objections. or dilatory pleas. The Court well said, that the plaintiffs' relation to each other was not in issue by the pleadings. Though to avoid controversy, or argument, the marraige of the plaintiffs was proved,and that too without any objection.

Had the Packct Company interposed a special plea of the non-marriage of the plaintiff, and carried the point, it could not have destroyed Sarah A. Clough's right of action. The worst that could have happened, would have been to eliminate, or drop Carlos. Clough, and to let the cause proceed, in the name of the sole, real plaintiff, who suffered the personal injury, and in whom the right of action exists.

Counsel for the defendant saw that nothing was to be gained by controverting the truthful, preliminary averments of the declaration, and they at oncc, pleaded to the merits, and on the issue of not guilty, the cause was tried.

How could the non-cohabiting, or non-living together, of the plaintiff, mitigate the injury, or the damages? If any trouble or domestic grievances existed, it is difficult to comprehend how they could mitigate the calamity which befell Sarah A. Clough, through the carelessness of the Packet Company, or how she is entitled to ess redress, or why her remedy should be diminished on account of her prior trials, sorrows and ill fortuue.

The effort of counsel in that direction, no doubt had a tendency to make an unfavorable impression on the minds of the jury against the plaintiffs,but did not influence them to the extent of preventing a verdict in their favor. There are two or three oth er minor exceptions, which are hardly worth arguing.

There have been two thorough trials, at which the defendant was represented by able counsel. And,at both trials,the verdicts were for nearly the same amount. There is nothing in the record to indicate that injustice has been done,or any substantial error committed,which ought to cause a reversal of the judgment, for the purpose of anoth-

er trial. It is desirable on the part of the plaintiffs, that the contest be ended by an affirmance of the judgment. And it is respectfully submitted that such ought to be the result.

BARTLETT & HAYDEN,
& GEO. W. LAKIN,
For Defts. in Error.

Some additional authorities have come to our notice since writing the annexed brief, and we will briefly review the several points appearing in the printed case.

The first objection made by the plaintiff. in error, will be found in printed case, on page 20, and was to the admission of the deposition of Sarah A. Clough, one of the parties plaintiff. and the reason assigned, that she was the wife of the other party plaintiff, Carlos Clough. The defendants in error claim that by the Statute of Wisconsin and the decisions of said State, Mrs. Clough was a proper witness—she being one of the plaintiffs and a necessary party plaintiff in said action.

See Laws and Decisions cited on pages 2, 3. 4 and 5, of annexed brief

The act of Congress of July 6th, 1862, declares 'That the laws of the State in which the court shall be held, shall be the rules of decision as to competency of witnesses in the courts of the United States in trials at Common Law, in equity and admarality —12 United States Statutes at large, page 588.

The laws of Wisconsin are very full upon this subject. They go farther than the act of Congress of July 2d, 1864, which merely provides that "there shall be no exclusion of any witness on account of color nor in civil actions because he is a party," &c.

In addition to the express Statute of Wisconsin, permitting the wife to testify when a party (annexed brief page 3, Taylor's Statutes, page 1599), Section 73, Chr. 176, laws of 1868, provides, "that a party to any civil action or special proceeding in any and all courts and before any and all tribunals, and before any and all officers acting judicially, may be examined as a witness in his own behalf, or in behalf of of ANY OTHER PARTY in the same manner and subject to the same rules of examination as any other witness, provided" * * * Taylors Statutes, page 1600, Sec. 74.

The Statute ennmerates certain exceptions which is equivalent to the oxclusion of all others. "Expressio unius est exclusio alterius." It will be seen that the exceptions do not exclude the wife when a party.

The Supreme Court of this State has in several cases fully sustained this position, and it has become well settled in this State, that the wife is a competent witness, when a party to the action.

In Farrell vs. Ledwell, 21 Wis., page 182, the court says:—

"This Statute gives the right to the wife in actions to which she is a party, to testify in her own behalf," * * * "The Statute has broken in upon the rule so far as to permit them (husband and wife) to testify when PARTIES to actions.

Also see Barnes vs. Martin, 15 Wis., page 246.

The second objection will be found on page 22, printed case, and is in reference to the admission of the defendants agent (the Captain of the boat) made during the trip from Reed's Landing to Davenport, and is fully treated on pages 5 and 6 of the annexed brief.

This conversation related to the accident, and was had on board the boat, and while the plaintiffs in error were fulfilling the contract made with the defendant in error, Mrs. Clough. to take and convey her from Reed's Landing, where the accident happened, to Davenport. It was so closely connected with the res gestæ of the action as to be a part thereof.

See The Potomoc, 7 Wallace, page 590

Home Machine Co. vs Snow, 32 Iowa, 433

The third objection relates to the exclusion on the trial of the deposition of the witness, Robert Turner. Page 23, printed case

See pages 6, 7 and 8 annexed brief.

The certificate of commissioner does not show why notice was not given to adverse party or their attorneys The plaintiffs in the court below had no notice of the taking of this deposition, did not appear when taken and have therefore waived no rights on their part.

The record of the case does not show that the deposition in any manner referred to any issue in the case, or if had, would in any manner have been competent or important testimony therein.

The fourth objection refers to the exclusion of evidence tending to show that the plaintiff, Carlos Clough, was not living with his wife Sarah A. Clough. Printed case, pages 25 and 26

These objections together with the exceptions taken to the charge of Judge Drummond—Printed case, page 27,—are all the points raised in this case.

The fourth objection as well as the objections of same nature in the Judges charge are settled by the pleadings.

See declaration and answer—printed case, pages 10, 11 and 12.

BARTLETT & [redacted],

Attorneys for Defendants in Error.